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The Supreme Court speaks rarely about the meaning of the Sherman Act. When the Court does speak, its pronouncements have particular resonance and staying power among jurists, scholars, and enforcers. NCAA v. Board of Regents of the University of Oklahoma *was such a case. There the Court assessed agreements reducing the output and increasing the prices of televised college football games. After announcing that restraints imposed by sports leagues are exempt from* per se *condemnation, the Court went on to invalidate the challenged agreements under the rule of reason because they produced significant economic harm without offsetting benefits. In so doing, the Justices also addressed restraints not before the Court, opining that members of the NCAA may collectively restrict the level of compensation that universities provide student-athletes.*

Announced almost four decades ago, NCAA *and its rationale have exerted substantial influence on the Sherman Act doctrine, enforcement policy, and scholarly discourse well beyond the context of sports leagues. Recently, in* NCAA v. Alston*, the Court revisited the antitrust propriety of collective limitations on the compensation schools pay student-athletes. There the Court reviewed the Ninth Circuit's condemnation of NCAA regulations restricting the value of education-related benefits, such as post-graduation scholarships, that schools provide student-athletes in addition to tuition, room, board, and other costs of attendance.*

While antitrust scholars and practitioners disagree about the merits of the Ninth Circuit's decision, all hoped the Court would clarify the extent to which the NCAA may limit student-athlete compensation. This Article contends that Alston *also presented the Court with an opportunity to address more fundamental questions. That is, the case offered the Court a chance to correct* NCAA's *erroneous application of the* per se *standard and derivative errors the*

* Ball Professor of Law and Co-Director, Center for the Study of Law and Markets, William & Mary Law School.

Court committed when conducting rule of reason analysis—errors that reverberate throughout Sherman Act jurisprudence.

In particular, the Article demonstrates that NCAA*'s sports league exemption from the ordinary* per se *standard contradicts basic antitrust principles. Moreover, the rationale for the exemption turned partly on the Court's (correct) assertion that some horizontal restraints can overcome market failures and enhance interbrand competition. Recognition of these potential benefits undermined the Court's otherwise broad articulation of the* per se *rule that purportedly created the need for such an exemption in the first place.*

Failure to condemn the restraints before it as unlawful per se *also distorted the Court's pronouncements regarding how to conduct rule of reason analysis. For instance, the requirements for establishing a prima facie case should depend upon the nature of redeeming virtues a restraint might produce. However, courts, agencies, and scholars have read* NCAA *as holding that proof that a restraint produces prices exceeding the nonrestraint baseline necessarily establishes such a case, even when the restraint may overcome a market failure. Moreover, lower courts, agencies, and the Court itself have read* NCAA *as endorsing a "Quick Look" approach in some rule of reason cases, allowing plaintiffs to bypass any requirement to establish anticompetitive harm. Finally, the Court's approach to rule of reason analysis lent credence to the dubious assumption that benefits produced by challenged restraints necessarily coexist with harms, bolstering the equally dubious less restrictive alternative test. However, the Court failed to take the opportunity in* Alston *to correct these errors and ensure a more coherent Section 1 jurisprudence that better reflects the teachings of modern economic theory.*

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INTRODUCTION

Section 1 of the Sherman Act potentially governs most contractual activity in the nation's economy, and the Supreme Court has the final word on the statute's meaning and application. Still, very few antitrust controversies reach the Supreme Court.[1] When the Court does consider a Section 1 case, it usually confines itself to determining whether a particular category of restraint is unlawful *per se* and thus not properly subject to rule of reason analysis.[2] The Court's rare Section 1 pronouncements, whether about the *per se* rule or the methodology for assessing restraints under the rule of reason, have particular resonance and staying power among jurists, scholars, and enforcers.

Decided almost four decades ago by an entirely different Court, *NCAA v. Board of Regents of the University of Oklahoma*[3] exemplifies

1. *See* Mark S. Popofsky & Douglas H. Hallward-Driemeier, *Antitrust and the Roberts Court*, 28 ANTITRUST L.J. 26, 26 (2014) (reporting that the Supreme Court heard only nineteen antitrust cases between 1993 and 2014). It should be noted that only some of these cases involved interpretation of Section 1 of the Sherman Act and thus the content of the rule of reason.

2. *See* Alan J. Meese, *In Praise of All or Nothing Dichotomous Categories: Why Antitrust Law Should Reject the Quick Look*, 104 GEO. L.J. 835, 853 (2016) ("The Supreme Court has declined to articulate a comprehensive methodology for conducting full-blown rule of reason analysis, leaving lower courts and enforcement agencies to fill in the gaps and articulate the precise standards governing this analysis.").

3. 468 U.S. 85 (1984).

such a rare, influential decision.[4] Of course, in the popular mind, the case has stood for the proposition, which some consider dicta, that colleges and universities may collectively decide not to pay student-athletes more than the cost of attendance for attending the schools where they matriculate, thereby preserving the "amateur" status of such participants.[5] Scholars and lower courts continue to disagree about the implications of this statement and how to assess restrictions on student athlete compensation under the rule of reason. For instance, some lower courts have read this language as holding that limits on student-athlete compensation are lawful *per se*, while others have rejected this conclusion.[6] The Supreme Court revisited the issue of student-athlete compensation this most recent term, in *NCAA v. Alston*.[7] There the Court reviewed and affirmed the Ninth Circuit's invalidation of the NCAA's restrictions on education-related benefits that schools may provide to student-athletes over and above tuition, room, board, and other costs of attendance.[8]

Alston certainly clarified the application of *NCAA* and Section 1 to a particular form of student-athlete compensation,[9] but *Alston* provided the Court with an opportunity to address more fundamental questions raised by *NCAA*. That is, the case offered the Court a chance to correct *NCAA*'s erroneous application of the *per se* standard and derivative errors the Court committed when conducting rule of reason analysis, errors that have reverberated well beyond the sports league context.[10] Unfortunately, *Alston* missed these opportunities, leaving in place and even bolstering most of *NCAA*'s mistakes. *NCAA* will thus continue to exercise significant influence over Section 1 doctrine, both inside and outside the context of sports leagues.

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4. *See generally id.*

5. *See id.* at 101–02; *see also* Cameron D. Ginder, Note, *NCAA and the Rule of Reason: Analyzing Improved Education Quality as a Procompetitive Justification*, 57 WM. & MARY L. REV. 675, 686 (2015) ("Justice Stevens's comments on compensation were mere dicta.").

6. *Compare* Deppe v. NCAA, 893 F.3d 498, 501–02 (7th Cir. 2018) (quoting *NCAA* decision in holding that NCAA Bylaws "clearly meant to help maintain the 'revered tradition of amateurism in college sports' or the 'preservation of the student-athlete in higher education'" are lawful *per se*); Agnew v. NCAA, 683 F.3d 328, 342–43 (7th Cir. 2012) (same), *with* O'Bannon v. NCAA, 802 F.3d 1049, 1063–64 (9th Cir. 2015) (rejecting this approach and assessing such restrictions under the rule of reason). *See also* Ginder, *supra* note 5, at 687 ("Justice Stevens's dicta and lower court decisions notwithstanding, there is no per se rule of legality for NCAA restraints on compensation . . . ."); *id.* (rejecting decisions such as *Agnew* holding that limits on student-athlete compensation are lawful *per se*).

7. 141 S. Ct. 2141 (2021).

8. *Id.* at 2165–66.

9. *See id.*

10. *See* Herbert J. Hovenkamp, *The NCAA and the Rule of Reason*, 52 REV. INDUS. ORG. 323, 325–27 (2017).

Ironically, the restraints challenged in *NCAA* had nothing to do with student-athlete compensation. Instead, the Court evaluated a horizontal agreement to reduce the number of televised college football games and increase the price that members charged networks to broadcast such contests.[11] Under ordinary Section 1 analysis, courts summarily condemn as "unlawful *per se*" any agreement that restrains rivalry between parties to it, unless the arrangement displays the potential to create "redeeming virtues" in the form of productive or other efficiencies.[12] This standard parallels the ancillary restraints doctrine, which condemns agreements as "naked" horizontal agreements when they are accompanied by an otherwise legitimate venture but show no prospect of enhancing the efficiency of the enterprise.[13] Application of this doctrine requires courts and agencies to assess whether challenged restraints may produce efficiencies, an inquiry analogous to that undertaken when tribunals determine whether restraints in a given category might produce redeeming virtues.[14]

For three decades leading up to *NCAA*, the Court had adopted a very narrow definition of "redeeming virtues" when assessing horizontal restraints.[15] The Court had thus condemned some restraints that appeared ancillary because they might have advanced legitimate objectives of otherwise valid ventures. Most notably, in *United States v. Topco Associates, Inc.*,[16] the Court condemned as unlawful *per se* horizontal allocations of exclusive territories, even though these restraints showed the potential to create significant benefits and were thus ancillary to a legitimate venture.[17] The Court subsequently reaffirmed *Topco*, and the NCAA's explicit restraints on price and output seemed ripe for condemnation under these recent applications of the *per se* standard.[18]

Contrary to the dictates of then-current precedent, *NCAA* held that the apparently naked restraints on price and output of broadcast games were not unlawful *per se*.[19] Sports leagues, the Court said,

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11. NCAA v. Bd. of Regents of Univ. of Okla., 468 U.S. 85, 91–95 (1984) (describing the agreement behind the controversy).

12. *See* Alan J. Meese, *Will the Supreme Court Recover Its Own Fumble? How* Alston *Can Repair the Damage Resulting from* NCAA's *Sports League Exemption*, 11 WAKE FOREST L. REV. ONLINE 70, 71–73 (2021).

13. *See id.* at 76–81.

14. *See id.* at 74–75.

15. *See id.* at 74.

16. 405 U.S. 596 (1972).

17. *Id.* at 610–12.

18. *See infra* Subpart I.B (explaining how *Topco* and other pre-*NCAA* decisions articulated and applied broad *per se* rule against horizontal restraints); Eugene F. Zelek, Jr. et al., *A Rule of Reason Decision Model After* Sylvania, 68 CALIF. L. REV. 13, 24–25 (1980) ("The Court's treatment of *Topco* confirms the belief that horizontal arrangements unreasonably restrict competition.").

19. NCAA v. Bd. of Regents of Univ. of Okla., 468 U.S. 85, 100–01 (1984).

necessarily required some horizontal cooperation to function in the first place, while other (optional) cooperation could enhance the quality of venture products.[20] In the context of intercollegiate athletics, the Court said, the second form of cooperation could include horizontal limits on competition for the services of student-athletes.[21] While such cooperation was perhaps not necessary to create and operate such a league, these restraints could protect and reinforce the amateur nature of intercollegiate competition, a component of the NCAA's brand. While such restraints reduced rivalry in one part of the market, they could also overcome a market failure and thus enhance interbrand competition between college athletics and other forms of live entertainment. The favorable invocation of these restraints not before the Court necessarily implied that such agreements would survive *per se* condemnation.

Because some restraints imposed by the NCAA could be reasonable, the Court said, *all* restraints imposed by sports leagues were immune from *per se* condemnation, regardless of whether proponents of challenged restraints could identify any redeeming virtues that such restraints may produce.[22] At the same time, the Court reaffirmed prior decisions, including *Topco*, that had condemned as unlawful *per se* horizontal restraints that had appeared capable of producing significant economic benefits.[23] Thus, the decision articulated an overall Section 1 regime that broadly and summarily condemned as unlawful *per se* most horizontal restraints (including some restraints historically deemed "ancillary" and therefore traditionally assessed under the rule of reason) but that simultaneously exempted all restraints imposed by sports leagues from this *per se* ban.

Departing from its ordinary practice, the Court went on to assess the restraints under the rule of reason, finding that they produced significant competitive harm without any offsetting benefits.[24] In so doing, the Court rejected the NCAA's contention that proof of market power was necessary to establish a prima facie case, relying instead on the district court's findings that the restraints produced actual detrimental effects by reducing output and increasing prices compared to a nonrestraint baseline that is purely hypothetical.[25]

Both sets of pronouncements—the *per se* standard and the rule of reason—have exerted substantial influence on the Sherman Act doctrine, enforcement policy, and scholarly discourse well beyond the context of amateur and professional sports. Indeed, the decision has inspired, perhaps inadvertently, a third approach to Section 1

20. *Id.* at 101–02.
21. *See id.*
22. *See id.* at 100–03.
23. *Id.* at 98–100.
24. *Id.* at 104–20.
25. *Id.* at 109–10, 119–20.

analysis; the "Quick Look." Under this approach, plaintiffs may establish a prima facie case against certain restraints that avoid *per se* condemnation without adducing evidence of harm.[26] Even if defendants rebut the prima facie case by introducing evidence that the restraint produces significant benefits, the plaintiffs may nonetheless prevail by establishing that the defendants could have achieved the same benefits via a less restrictive means.[27]

This Article contends that *NCAA*'s sports league exemption from the ordinary *per se* standard—which *Alston* did not question—contradicts basic antitrust principles. Any number of ventures, including garden variety partnerships or even the venture in *Topco*, require some reasonable horizontal cooperation to function and thrive. Even so, restraints that accompany such ventures are not immune from summary condemnation. Instead, courts and agencies have evaluated such agreements under the ancillary restraints doctrine, condemning those contracts that display no potential to enhance the venture's efficiency.[28]

NCAA did not mention the ancillary restraints doctrine or explain why it ignored this test, which the lower court had expressly applied, nor did the decision mention the test for *per se* illegality or identify any redeeming virtues that the restraint might create.[29] Moreover, while the Court purported to reaffirm *Topco* and similar decisions, its conclusion that some restraints not before it were likely reasonable because they overcame a market failure and enhanced interbrand competition contradicted *Topco*'s rationale and implicitly narrowed the very *per se* rule from which the Court exempted restraints imposed by sports leagues. Put another way, the rationale for *NCAA*'s sports league exemption tacitly undermined the very decisions that purportedly gave rise to the need for such an exemption in the first place.

The decision's pronouncements regarding how to establish a prima facie case under the rule of reason and dicta that inspired the "Quick Look" fare no better. Indeed, these two errors apparently followed from the former, that is, the Court's decision to exempt any and all sports league restraints from *per se* condemnation. After all, the proper methodology for establishing a prima facie case should turn upon the nature of the redeeming virtues that a restraint might produce. Where a restraint avoids *per se* condemnation because it might overcome a market failure, proof that it expressly sets prices or actually increases prices above a prerestraint baseline may simply confirm that the restraint corrects a poorly functioning market and thus should not itself establish a prima facie case. The restraint

26. Meese, *supra* note 2, at 855–58.

27. *Id.* at 858–59.

28. *See* Meese, *supra* note 12, at 75–77.

29. Bd. of Regents of Univ. of Okla. v. NCAA, 707 F.2d 1147, 1153–56 (10th Cir. 1983), *aff'd*, 468 U.S. 85 (1984).

before the Court displayed no potential to create redeeming virtues, let alone virtues that entailed elimination of a market failure. Because there was thus no conceivable benign or beneficial explanation for the price increase, the Court naturally interpreted this increase as strong evidence of anticompetitive harm.[30]

Such an approach would likely produce accurate results when applied to restraints, such as those in *NCAA* itself, that apparently cannot produce redeeming virtues. In such cases, reliance upon actual detrimental effects or the "Quick Look" to establish a prima facie case will simply replicate the result produced by correct application of the *per se* rule, so long as plaintiffs are willing and able to incur the expense necessary to establish that, say, the challenged restraint produces anticompetitive harm. However, neither *NCAA* itself nor subsequent decisions that have invoked the "Quick Look" or the actual detrimental effects test have confined application of these methods to restraints that appear incapable of producing redeeming virtues.

Unlike the restraint in *NCAA*, most forms of partial contractual integration that survive *per se* condemnation do so precisely because they may produce redeeming virtues by overcoming a market failure. Thus, the restraints before the Court, which *NCAA* exempted from *per se* condemnation without identifying any redeeming virtues, were not representative of those that courts assess under the rule of reason. Subsequent courts, scholars, and enforcement agencies erred, however, in generalizing this methodology—developed in a nonrepresentative case—to all rule of reason cases, thereby rendering it too easy for plaintiffs to establish a prima facie case and cast upon defendants an expensive burden of production. The result has been more than three decades of doctrinal evolution and scholarly dialogue premised upon an idiosyncratic and misleading application of the rule of reason.

NCAA's errors loomed particularly large as the *Alston* Court reconsidered the Sherman Act's treatment of the NCAA's limits on student-athlete compensation. The *Alston* case provided the Court with a perfect opportunity to correct *NCAA*'s errors and ensure a more coherent Section 1 jurisprudence that better reflects the teachings of modern economic theory.[31] Unfortunately the Court fumbled this opportunity, leaving *NCAA*'s erroneous approach largely in place.[32]

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30. *See NCAA*, 468 U.S. at 120.

31. *See* Meese, *supra* note 12, at 71, 84–91 (describing what the Supreme Court could have done in *Alston*).

32. *See, e.g.*, Sarah Eberspacher & Martin D. Edel, National Collegiate Athletic Association v. Alston: *Supreme Court Sides with Student-Athletes in* NCAA v. Alston, *Expands Permissible Types of Compensation*, NAT'L L. REV. (June 21, 2021), https://www.natlawreview.com/article/national-collegiate-athletic-association-v-alston (noting that by affirming the Ninth Circuit's

The result and reasoning of *Alston* exemplified the staying power of *NCAA*'s sports league exemption and subsequent errors that the exemption inspired.

Part I recounts the state of the law regarding the scope of the *per se* rule before *NCAA*. Part II describes the Court's surprising refusal to condemn the restraints before it as unlawful *per se*. Part III critiques the sports league exemption the Court fashioned to shelter the challenged restraints from ordinary *per se* standards. Part IV scrutinizes the Court's endorsement of the actual detrimental effects approach to establishing a prima facie case as well as the dicta that gave rise to the "Quick Look," exploring and assessing both aspects of the decision and its progeny. A brief conclusion follows and explores the implications of this Article's critiques.

I. PRE-*NCAA* CASE LAW ON THE SCOPE OF THE *PER SE* RULE

A. General Per Se *Standards*

To understand how *NCAA* went wrong, one must first review the state of the law governing horizontal restraints in 1984, including the *per se* rule and the standards governing its implementation. Beginning with *Standard Oil Co. v. United States*,[33] the Court has long held that Section 1 only prohibits "unreasonable" restraints.[34] Restraints were unreasonable, the Court said, if they unduly restrained interstate commerce by producing a monopoly or the consequences of a monopoly, namely higher prices, reduced output, and/or lower quality.[35] Application of this standard required courts to apply evolving economic conceptions when determining whether challenged restraints produced these prohibited effects.[36]

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decision, the Court also reaffirmed the usage of the three-part "rule of reason" analysis in the college and university sports league context).

33. 221 U.S. 1 (1911).

34. *See generally id. See also* Nat'l Soc'y of Pro. Eng'rs v. United States, 435 U.S. 679, 690, 695 (1978) (endorsing and elaborating upon *Standard Oil*); Cont'l T.V., Inc. v. GTE Sylvania Inc., 433 U.S. 36, 49 (1977) (citing *Standard Oil*, 221 U.S. 1) ("Since the early years of this century, a judicial gloss on this statutory language has established the 'rule of reason' as the prevailing standard of analysis.").

35. *See Standard Oil*, 221 U.S. at 52, 58 (listing three "evils" which led to public outcry against monopolies in England and concluding that identical concerns motivated American common law); *see also* Alan J. Meese, *Price Theory, Competition, and the Rule of Reason*, 2003 U. ILL. L. REV. 77, 87–89 (2003) (describing *Standard Oil*'s holding that Section 1 forbids only those agreements that produce monopoly or evils of monopoly, namely, higher prices, reduced output, or reduced quality).

36. *See* Meese, *supra* note 35, at 90–92 (explaining how *Standard Oil*'s rule of reason required courts to adjust antitrust doctrine in response to evolving economic theory).

Ordinarily, rule of reason analysis is a fact-intensive exercise, with courts examining various factors bearing upon the impact of the challenged restraint.[37] However, even before *Standard Oil*, then-Judge and future Chief Justice William Howard Taft had opined that horizontal restraints that were not "ancillary" to some other legitimate venture but instead had the "sole object . . . to restrain competition, and enhance or maintain prices" were automatically unlawful, regardless of actual economic impact.[38] Moreover, *Standard Oil* itself had suggested that courts should condemn some restraints as unreasonable based simply on their "nature or character."[39] The Court subsequently drew upon these suggestions, holding that certain types of restraints were unreasonable without more.[40] Such "*per se* rules" were categorical in nature, requiring summary condemnation of all agreements, without exception, that satisfied the criteria for inclusion in the relevant category, even if

37. *See* Broad. Music, Inc. v. Columbia Broad. Sys., 441 U.S. 1, 8 (1979) (noting that rule of reason is "generally applied in Sherman Act cases"); White Motor Co. v. United States, 372 U.S. 253, 261 (1963) ("[*Standard Oil*'s] rule of reason normally requires an ascertainment of the facts peculiar to the particular business."); *see also Sylvania*, 433 U.S. at 49 ("Under this rule, the factfinder weighs all of the circumstances of a case in deciding whether a restrictive practice should be prohibited as imposing an unreasonable restraint on competition."); *id.* at 49–50, n.15 ("One of the most frequently cited statements of the rule of reason is that of Mr. Justice Brandeis in [*Chi. Bd. of Trade v. United States*], 246 U.S. 231, 238 (1918): 'The true test of legality is whether the restraint imposed is such as merely regulates, and perhaps thereby promotes, competition, or whether it is such as may suppress or even destroy competition. To determine that question, the court must ordinarily consider the facts peculiar to the business to which the restraint is applied; its condition before and after the restraint was imposed; the nature of the restraint and its effect, actual or probable. The history of the restraint, the evil believed to exist, the reason for adopting the particular remedy, the purpose or end sought to be attained, are all relevant facts. This is not because a good intention will save an otherwise objectionable regulation or the reverse, but because knowledge of intent may help the court to interpret facts and to predict consequences.'").

38. *See* United States v. Addyston Pipe & Steel Co., 85 F. 271, 282–83 (6th Cir. 1898).

39. *See Standard Oil*, 221 U.S. at 58.

40. *See* Klor's, Inc. v. Broadway-Hale Stores, Inc., 359 U.S. 207, 211 (1959) ("[*Standard Oil*] emphasized, however, that there were classes of restraints which, from their 'nature or character' were unduly restrictive, and hence forbidden by both the common law and the statute.") (citing *Standard Oil*, 221 U.S. at 58, 65); Kiefer-Stewart Co. v. Seagram & Sons, Inc., 340 U.S. 211, 213 (1951) (describing agreements "raising, depressing, fixing, pegging, or stabilizing the price of a commodity in interstate or foreign commerce" as illegal *per se*); United States v. Trenton Potteries, 273 U.S. 392, 398–99 (1927) (citing *Addyston Pipe* for the proposition that horizontal price fixing between firms "controlling in any substantial manner a trade or business in interstate commerce" is unreasonable).

particular agreements that fell into the category were harmless or produced net benefits.[41]

More than twenty-five years before *NCAA*, in *Northern Pacific Railway Co. v. United States* ("*NPR*"),[42] the Court articulated the definitive standard governing whether a particular category of agreement is unlawful *per se*.[43] The Court announced that a category must satisfy two distinct conditions to merit *per se* condemnation. First, agreements in the category must have a "pernicious effect on competition."[44] Second, the agreements must "lack any redeeming virtue."[45] Agreements that satisfy both conditions, the Court said, are "conclusively presumed to be unreasonable" without any showing of harm or case-by-case opportunity for defendants to establish any "business excuse."[46]

When applying the first part of the test, the Court effectively equated "competition" with atomistic rivalry, treating the impact of a restraint as "pernicious" whenever it reduced such rivalry without

41. *See, e.g.*, Arizona v. Maricopa Cnty. Med. Soc'y, 457 U.S. 332, 342–46, 351–52 (1982); United States v. Topco Assocs., Inc., 405 U.S. 596, 610–12 (1972) (finding that challenged restraint was unlawful *per se* regardless of potential positive impact on interbrand competition and lack of significant harm).

42. 356 U.S. 1 (1958).

43. *Id.* at 5.

44. *Id.*

45. *Id.*; *see also* White Motor Co. v. United States, 372 U.S. 253, 264–65 (1963) (Brennan, J., concurring) (quoting the *NPR* standard and explaining that "inherently suspect" agreements are only unlawful *per se* if "every form of such restraint is utterly without justification").

46. N. Pac. Ry. Co. v. United States, 356 U.S. 1, 5 (1958) ("[T]here are certain agreements or practices which, because of their pernicious effect on competition and lack of any redeeming virtue are conclusively presumed to be unreasonable and therefore illegal without elaborate inquiry as to the precise harm they have caused or the business excuse for their use."); *see also* Catalano, Inc. v. Target Sales, Inc., 446 U.S. 643, 646 (1980); Cont'l T.V., Inc. v. GTE Sylvania Inc., 433 U.S. 36, 49–50 (1977) (quoting *NPR* test as definitive statement of *per se* rule); *Topco*, 405 U.S. at 607 (same); *White Motor*, 372 U.S. at 262–64 (applying *NPR* test and rejecting *per se* condemnation for vertical customer allocation agreement); Broad. Music, Inc. v. Columbia Broad. Sys., 441 U.S. 1, 8 (1979) ("[T]he Court has held that certain agreements or practices are so 'plainly anticompetitive,' and so often 'lack . . . any redeeming virtue,' that they are conclusively presumed illegal without further examination under the rule of reason . . . ." (internal citations omitted)). More recently the Court has continued to endorse the *NPR* test. *See* State Oil Co. v. Khan, 522 U.S. 3, 10 (1997) ("Some types of restraints, however, have such predictable and pernicious anticompetitive effect, and such limited potential for procompetitive benefit, that they are deemed unlawful per se."); *see also* Leegin Creative Leather Prods. v. PSKS, Inc., 551 U.S. 877 (2007) (articulating and applying test to minimum resale price maintenance agreements and refusing to condemn such restraints as unlawful *per se*). It should be noted that, so far as this author is aware, no opinion by Justice Stevens, the author of *NCAA*, invoked the *NPR* test for determining whether a category of restraint is unlawful *per se*.

assessing whether the restraint would produce economic harm.[47] Because contracts by their nature restrict individual autonomy,[48] many agreements limit rivalry in a manner that produces the sort of "pernicious" effect on atomistic competition that satisfies this first prong.[49] As a result, designation of a category as "unlawful *per se*" or not has almost always turned on whether agreements in the category might produce "redeeming virtues."[50]

Defendants can always identify *some* aspect of challenged agreements that *they* consider "redeeming." Such self-serving assertions do not prevent *per se* condemnation.[51] Instead, defendants must identify some benefit to society that such restraints might produce, such as reduced production costs or reduction in the cost of employing imperfect markets to conduct economic activity.[52]

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47. *See* Meese, *supra* note 35, at 94 ("Plaintiffs can readily satisfy the first prong of this test, given the manner in which the Court defines anticompetitive when conducting per se analysis. Like *Standard Oil*, the Court has abjured any technical definition of competition and instead equated the term with 'rivalry' for the purpose of per se analysis, with the result that any coordination of previously independent activity is anticompetitive.").

48. *See* Nat'l Soc'y of Pro. Eng'rs v. United States, 435 U.S. 679, 687–88 (1978) ("[A]s Mr. Justice Brandeis perceptively noted, restraint is the very essence of every contract; read literally, § 1 would outlaw the entire body of private contract law. Yet it is that body of law that establishes the enforceability of commercial agreements and enables competitive markets—indeed, a competitive economy—to function effectively.") (citing Chi. Bd. of Trade v. United States, 246 U.S. 231, 238 (1918)); *see also Sylvania*, 433 U.S. at 53 n.21 (invoking recognition by Justice Brandeis that contracts necessarily restrict parties to them to reject contention that Section 1 should ban agreements that restrict the "autonomy of independent businessmen").

49. *See* Meese, *supra* note 35, at 94–95 ("This definition of anticompetitive sweeps quite broadly, applying as it does to any number of garden variety arrangements. The formation of a partnership or a corporation, for instance, necessarily eliminates actual or potential rivalry between the parties to the new venture.").

50. *See id.* at 96 ("[G]iven the breadth with which the Court defines anticompetitive, it is the second portion of this test that saves most restrictions on rivalry from automatic condemnation . . . .").

51. *See* United States v. Arnold, Schwinn, & Co., 388 U.S. 365, 375 (1967) ("[E]very restrictive practice is designed to augment the profit and competitive position of its participants. Price fixing does so, for example, and so may a well-calculated division of territories.").

52. *See Sylvania*, 433 U.S. at 54–57 (treating propensity of restraints to induce optimal promotional investments by dealers as redeeming virtue for the purpose of *per se* analysis); Standard Oil Co. v. United States, 337 U.S. 293, 306–07 (1949) (detailing potential benefits of requirements contracts, including reduced selling and storage costs); *id.* at 307–08 (concluding that the prospect of such benefits precluded automatic condemnation without inquiry into defendants' market position); *see also* John M. Newman, *Procompetitive Justifications in Antitrust Law*, 94 IND. L.J. 501, 540–42 (2019).

The disparate treatment of partnerships and naked horizontal price fixing illustrates application of the *NPR* framework, particularly the role played by the possibility of redeeming virtues or lack thereof. Horizontal price fixing unrelated to a valid venture is unlawful *per se* because such conduct (1) always reduces rivalry *and* (2) never produces redeeming virtues.[53] The second conclusion follows from the Court's determination that a restraint's propensity to set reasonable prices, although redeeming from the perspective of defendants, is not a cognizable benefit and thus is not a redeeming virtue under the Sherman Act.[54]

Of course, the formation of partnerships and horizontal mergers between previously independent firms also eliminates atomistic rivalry and thus produces a "pernicious effect on competition" as the Court has defined this phrase.[55] However, even when the scope of the *per se* rule was at its maximum, courts declined to condemn such transactions as unlawful *per se* for obvious reasons; namely, such transactions may produce redeeming virtues in the form of productive or other efficiencies and thus do not satisfy the second part of the *per se* test.[56] Thus, the prospect of cognizable benefits, and not any

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53. *See* Meese, *supra* note 35, at 96–98; *see also* Thomas G. Krattenmaker, *Per Se Violations in Antitrust Law: Confusing Offenses with Defenses*, 77 GEO. L.J. 165, 171–72 (1988).

54. *See, e.g.*, Catalano, Inc. v. Target Sales, Inc., 446 U.S. 643, 647 (1980) ("It is no excuse that the prices fixed are themselves reasonable."); *see also, e.g.*, Fed. Trade Comm'n v. Superior Ct. Trial Laws. Ass'n, 493 U.S. 411, 424 (1990) quoting *Catalano*); Arizona v. Maricopa Cnty. Med. Soc'y, 457 U.S. 332, 349–50 n.22 (1982) (same); United States v. Trenton Potteries Co., 273 U.S. 392, 396–98 (1927).

55. If anything, the formation of a partnership or merger results in a more permanent reduction in rivalry than price fixing between independent firms. *See, e.g.*, Richard A. Givens, *Affirmative Benefits to Industrial Mergers and Section 7 of the Clayton Act*, 36 IND. L.J. 51, 52 (1960) ("Competition is eliminated far more completely by a close-knit combination such as a merger than by agreements limited to specific business policies.").

56. *See* Meese, *supra* note 35, at 95–98; *see also* Broad. Music, Inc. v. Columbia Broad. Sys., 441 U.S. 1, 9 (1979) ("When two partners set the price of their goods or services, they are literally 'price-fixing,' but they are not *per se* in violation of the Sherman Act."); United States v. Addyston Pipe & Steel Co., 85 F. 271, 280 (6th Cir. 1898) (explaining how a partnership's reduction in price competition is incidental to the "main purpose of a union of [the partners'] capital, enterprise and energy to carry on a successful business, and one useful to the community"); White Motor Co. v. United States, 372 U.S. 253, 263–64 (1963) (invoking merger as example of a transaction that reduces rivalry but survives *per se* condemnation); United States v. Columbia Steel, 334 U.S. 495, 507–08 (1948) (analyzing merger accomplished via purchase of assets under Section 1's rule of reason); *see also* Givens, *supra* note 55, at 52–53 (distinguishing naked price fixing from formation of partnership and mergers because latter transactions can create significant benefits); *cf*. *Maricopa*, 457 U.S. at 357 (stating that price fixing between partners in a partnership is "perfectly proper").

differential propensity to eliminate price competition, explained the disparate treatment of naked price fixing on the one hand and mergers or the formation of a partnership on the other.[57] Judicial assessment of the propensity of a type of restraint to produce redeeming virtues requires the application of "economic conceptions" that can change over time, thereby causing economists and economically sophisticated lawyers to revise their assessment of some restraints.[58] The *NPR* test did not entirely supplant the ancillary restraints doctrine, at least in the lower courts.[59] Thus, satisfaction of the ancillary restraints standard has remained an alternative method of avoiding *per se* condemnation.[60] The possible prospect of potential benefits plays a parallel role under the ancillary restraints doctrine. Restraints that reduce horizontal rivalry still merit rule of reason scrutiny if they appear capable of furthering legitimate purposes.[61] Failure to articulate such benefits results in a determination that such restraints are not ancillary and thus triggers automatic condemnation.[62]

The second part of the *NPR* test and the ancillary restraints test can potentially perform an additional function as well. If a restraint does survive *per se* condemnation because it is ancillary or may produce redeeming virtues, then the methodology of conducting rule

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57. *See* Givens, *supra* note 55, at 52–53 (concluding that mergers are "far more competition-destroying" than "loose-knit combinations," such as price-fixing and the allocation of markets, but that mergers avoid *per se* condemnation because they may produce "redeeming virtues" such as economies of scale).

58. Standard Oil Co. of N.J. v. United States, 221 U.S. 1, 55 (1911) (approving common law decisions that had repudiated previous doctrine because of the advent of "more accurate economic conceptions"); *see also* Business Electronics v. Sharp Electronics Co., 485 U.S. 717, 732 (1998) ("The term 'restraint of trade' in the statute, like the term at common law, refers not to a particular list of agreements, but to a particular economic consequence, which may be produced by quite different sorts of agreements in varying times and circumstances. . . . 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." (internal citations omitted)); Meese, *supra* note 35, at 91–92 ("[C]ourts have felt free to rely upon economic theories quite different from those extant in 1890, thus updating the Sherman Act to keep pace with changing perceptions about the economic consequence of particular agreements. While the principle animating the Rule of Reason remains constant, applications change, as courts translate the principle in light of new information." (internal citations omitted)).

59. *See* Denison Mattress Factory v. Spring-Air Co., 308 F.2d 403, 406–09 (5th Cir. 1962) (holding that vertical exclusive dealing agreement was ancillary to otherwise valid venture and thus not unlawful *per se*).

60. *See id.* at 408; *see also infra* note 66 and accompanying text.

61. *Addyston Pipe*, 85 F. at 280 (explaining that certain restraints that accompanied formation and operation of partnerships facilitated such ventures and "were to be encouraged").

62. *Id.* at 282–83.

of reason analysis should, at least in principle, turn upon the type of redeeming virtue or efficiency that a restraint might create, although this insight is generally lost on courts and enforcement agencies.[63] By forcing courts to assess whether restraints in a particular category might produce redeeming virtues or efficiencies that further a legitimate venture, both the *NPR* and ancillary restraints standards create a mechanism for informing the structure of rule of reason analysis.

For nearly two decades after *NPR*, the Court recognized very few redeeming virtues when applying the *per se* standard.[64] The number of restraints deemed unlawful *per se* expanded accordingly.[65] Group boycotts, horizontal maximum price fixing, maximum resale price maintenance, nonprice vertical restraints such as exclusive territories and restrictions on customers to whom wholesalers and dealers can resell, and tying agreements imposed by firms with any "economic power" were "conclusively presumed unreasonable," dictating automatic condemnation.[66] These results followed naturally from the state of economic theory at the time, which had few, if any, explanations for so-called nonstandard contracts that restricted the autonomy of dealers and other trading partners.[67]

63. *See* Alan J. Meese, *Reframing Antitrust in Light of Scientific Revolution: Accounting for Transaction Costs in Rule of Reason Analysis*, 62 HASTINGS L.J. 457, 523–27 (2010) (contending that requirements for establishing a prima facie case should turn on the nature of the "redeeming virtues" that thwart *per se* condemnation).

64. Meese, *supra* note 35, at 119, 125.

65. *Id.* at 94.

66. *See* Fortner Enters., Inc. v. U.S. Steel Corp., 394 U.S. 495, 499 (1969) (declaring tying contracts imposed by firms with "economic power" unlawful *per se*); *id.* at 503 (holding that ability to impose tying agreements itself established presumption of economic power sufficient to establish *per se* liability); Albrecht v. Herald Co., 390 U.S. 145, 152–53 (1968) (declaring maximum resale price maintenance unlawful *per se*); United States v. Arnold Schwinn & Co., 388 U.S. 365, 382 (1967) (condemning vertical exclusive territories and restrictions on customers to whom wholesalers and dealers can resell); Klor's, Inc. v. Broadway-Hale Stores, Inc., 359 U.S. 207, 212–14 (1959) (declaring "group boycotts" unlawful *per se*); Kiefer-Stewart Co. v. Joseph E. Seagram & Sons, Inc., 340 U.S. 211, 213 (1951) (declaring horizontal maximum price maintenance unlawful *per se*).

67. *See* Meese, *supra* note 35, at 115–23 (describing price theory's failure to offer beneficial explanations for nonstandard agreements and resulting hostility to such practices); *id.* at 124–34 (describing judicial reliance upon price-theoretic assumptions and resulting antitrust doctrine hostile to non-standard agreements); *see also* OLIVER E. WILLIAMSON, ECONOMIC INSTITUTIONS OF CAPITALISM 23–25 (1985) (distinguishing "standard" from "non-standard" contracts).

However, restraints properly deemed ancillary continued to escape *per se* condemnation in the lower courts.[68]

Perhaps because so many restraints were unlawful *per se*, the Court had little occasion to elaborate upon the methodology for conducting rule of reason analysis. When the Court did elaborate, it articulated a fact-bound standard.[69] Indeed, some decisions invoked the fact-intensive, standardless nature of rule of reason analysis to bolster *per se* condemnation of particular restraints.[70] This left lower courts and scholars to develop and apply rule of reason methodology.

B. Most Salient Cases as of 1984

NCAA evaluated horizontal restraints between members of a legitimate venture.[71] The agreements expressly reduced the output of televised games and increased the prices members charged networks to broadcast such contests.[72] The most relevant precedent governing such restraints at the time was *United States v. Topco Associates, Inc.* Decided in 1972, *Topco* assessed and condemned restraints that were apparently ancillary to a legitimate venture, holding that the propensity of such restraints to enhance interbrand competition was not a redeeming virtue under the *NPR* standard.[73]

Post-*Topco* decisions elaborated upon the standards governing the scope of the *per se* rule. This Subpart begins with a detailed

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68. *See* Tripoli Co. v. Wella Corp., 425 F.2d 932, 939 (3rd Cir. 1970) (holding that challenged distribution restraint was ancillary and thus avoided *per se* condemnation); *id.* at 936 (citing *Addyston Pipe* among others for the proposition that the challenged restraint "must be tested not by a per se rule but by the standard of reasonableness"); United States v. Columbia Pictures Corp., 189 F. Supp. 153, 178 (S.D.N.Y 1960) (evaluating horizontal restraint under the rule of reason); *id.* ("Where challenged conduct is subservient or ancillary to a transaction which is itself legitimate, the decision is not determined by a *per se* rule. The doctrine of ancillary restraints is to be applied.").

69. *See* Cont'l T.V., Inc. v. GTE Sylvania Inc., 433 U.S. 36, 49 (1977) ("[T]he factfinder weighs all of the circumstances of a case in deciding whether a restrictive practice should be prohibited as imposing an unreasonable restraint on competition."); *Arnold Schwinn,* 388 U.S. at 381–82 (affirming as not clearly erroneous district court's fact-intensive determination that consignment agreements granting wholesalers exclusive territories were not unreasonable); United States v. Columbia Steel, 334 U.S. 495, 527-33 (1948) (holding that merger between rivals was not unreasonable under Section 1 after fact-bound analysis).

70. *See, e.g.*, N. Pac. Ry. Co. v. United States, 356 U.S. 1, 5 (1958) (contending that *per se* condemnation "avoids the necessity for an incredibly complicated and prolonged economic investigation into the entire history of the industry involved . . . to determine whether a particular restraint has been unreasonable—an inquiry so often wholly fruitless when undertaken").

71. *See* NCAA v. Bd. of Regents of Univ. of Okla., 468 U.S. 85, 86 (1984).

72. *See id.* at 91–94 (describing the restraints at issue in the case).

73. *See* United States v. Topco Assocs., Inc., 405 U.S. 596, 612 (1972).

explication of the Topco venture and the Court's treatment of the restraints involved. The Subpart then examines post-*Topco* decisions that reaffirmed the opinion while further clarifying the definition of redeeming virtues and thus the content of the *per se* rule. A full appreciation of this pre-1984 caselaw will highlight the nature of the doctrinal questions that were before the *NCAA* Court. Such appreciation will inform the subsequent assessment of the Court's creation of a sports league exemption from the *per se* rule and the methodology of rule of reason analysis that the Court endorsed.

1. United States v. Topco Associates, Inc.

In *Topco*, several regional grocery chains formed a joint venture ("Topco").[74] The defendants were "small and medium-sized" chains, facing competition from national, regional, and local chains.[75] Each member received an equal ownership interest in Topco and thus equal rights to vote for directors, who were drawn from the members' executive officers.[76] Members agreed not to resell their shares to nonmembers, thereby excluding rival chains from access to the venture.[77] The venture created and sold hundreds of "private label" products to members for resale in their respective stores alongside prominent national brands.[78] The availability of such private label products strengthened the members' ability to compete with vertically integrated national chains, each of which was marketing its own internally-created private label brands.[79] Of course, Section 1 did not reach such single firm conduct, which did not constitute "concerted action" between two or more independent actors.[80] As a result, the vertically integrated national chains were free to confine distribution of their private label items as they saw fit.

The United States did not challenge the underlying venture, conceding that it was potentially beneficial.[81] Instead, the government challenged additional provisions effectively granting each member the exclusive right to distribute the private label product in its own territory.[82] The government claimed that these provisions functioned as naked horizontal restraints and were thus

74. *Id.* at 598.

75. *Id.*

76. United States v. Topco Assocs., Inc., 319 F. Supp. 1031, 1033–34 (1970), *rev'd*, 405 U.S. 596 (1972).

77. *Id.* at 1034 (explaining how "[t]he Topco by-laws . . . prevent Topco stock from falling into the hands of non-members").

78. *Id.* at 1033.

79. *Id.* at 1038.

80. *See* Copperweld Corp. v. Indep. Tube Corp., 467 U.S. 752, 767–68 (1984).

81. *Topco*, 319 F. Supp. at 1040.

82. *Id.* at 1038–39.

unlawful *per se*.[83] The district court rejected the government's argument, holding that the challenged restraints were "ancillary and subordinate to the fulfillment of the legitimate, procompetitive purpose of the Topco cooperative," because they could enhance interbrand competition; that is, rivalry between Topco members and national chains.[84]

Because the court rejected *per se* condemnation, it proceeded to assess the overall impact of the restraints. The district court found that members would not have entered the venture absent territorial exclusivity.[85] Members' executives uniformly opined that members operating in the same territory would free ride on each other's efforts to promote the private label products, thereby resulting in suboptimal promotional expenditures.[86] Lack of adequate promotion, in turn, would undermine the collective effort to compete with national chains armed with their own private label products and the proper incentives to promote them.[87] The court also found that, taken together, defendants' share of the national retail grocery market was less than six percent, with members' regional shares ranging between one and sixteen percent.[88] While the court conceded that the restraint might somewhat reduce intrabrand competition, it concluded that the procompetitive impact on interbrand competition far outweighed any such harm, holding that the restraint was reasonable and thus lawful under Section 1.[89]

The United States appealed. The government did not contest the district court's factual findings but claimed they were irrelevant

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83. *Id.* at 1040–41 (recounting government's argument that the restraint was unlawful *per se*).

84. *Id.* at 1040–43 (rejecting government's contention that challenged restraints were unlawful *per se*); *id.* at 1038 (finding that restraints "are ancillary and subordinate to the fulfillment of the legitimate, procompetitive purpose of the Topco cooperative, reasonable and in the public interest").

85. *Id.* at 1042 ("Every executive of a Topco member who was a witness stated categorically that his chain would not be interested in devoting the time, energy and money to the necessary promotion and would not be interested in Topco membership if one or more of his chain's competitors in the area also offered consumers the same brands and products. All of defendant's witnesses asserted that monopoly of Topco private label products was as essential to Topco members as the monopoly of A & P, National Tea, Jewel and other national chains' private label products was to these chains."); *see also id.* at 1040 ("The government concedes that if Topco, rather than being a buying organization for smaller local and regional chains, were a single, large national chain, none of its practices would be objectionable under the antitrust laws.").

86. *Id.* at 1040.

87. *See id.*

88. *Id.* at 1039.

89. *Id.* at 1043 ("Whatever anti-competitive effect these practices may have on competition in the sale of Topco private label brands is far outweighed by the increased ability of Topco members to compete both with the national chains and other supermarkets.").

because the restraints were unlawful *per se*.[90] The restraints were, the government argued, "a classic horizontal division of markets which [the] per se rule condemns," citing several decisions, including Taft's *Addyston Pipe* [91] opinion.[92]

Defending the judgment, defendants endorsed the *NPR* standard and conceded that certain horizontal restraints were unlawful *per se*.[93] They also invoked the parallel doctrine of ancillary restraints, contending that such agreements avoided *per se* condemnation.[94] The challenged restraints, they argued, fell into this category because of their propensity to further the legitimate purposes of the venture.[95]

To bolster their argument, the defendants invoked the work of two antitrust superstars: former Chief Justice William Howard Taft and Robert Bork.[96] In 1966, Bork rehabilitated the distinction between "ancillary" and other restraints that animated *Addyston Pipe*. Bork deployed this framework to evaluate territorial restraints that were then under challenge in some lower courts, restraints that were similar to those the Court would later evaluate in *Topco*.[97] In particular, Bork argued that such restraints could be ancillary and thus avoid *per se* condemnation because of their potential to prevent some venture members from free riding off promotional investments made by others.[98]

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90. United States v. Topco Assocs., Inc., 405 U.S. 596, 603 (1972).

91. 85 F. 271 (6th Cir. 1898).

92. See Brief for United States at 18, United States v. Topco Assocs., Inc., 405 U.S. 596 (1971) (No. 70-82).

93. *See* Brief for Topco at 27, United States v. Topco Assocs., Inc., 405 U.S. 596 (1971) (No. 70-82). In its brief, Topco cited the following three cases as examples of appropriate condemnations of horizontal restraints: United States v. Trenton Potteries Co., 273 U.S. 392 (1927); United States v. Nat'l Lead Co., 332 U.S. 319 (1947); and Timken Roller Bearing Co. v. United States, 341 U.S. 593 (1951).

94. *See* Brief for Topco, *supra* note 93,. at 25–34 (contending that "Topco licensing must be measured against the standard of ancillary agreements").

95. *Id.*

96. *Id.* at 26 (contending that, in *Addyston Pipe*, "Judge Taft, later Chief Justice, drew the basic and still valid distinction between those naked restraints, unaccompanied by any purpose except the suppression of competition, and covenants which are appurtenant to a primary and legitimate business purpose"); *id.* at 27 (invoking "the well-established principle of ancillary restraints, as originally articulated by Judge Taft"); *id.* at 22 (citing Robert H. Bork, *The Rule of Reason and the Per Se Concept*: *Price Fixing and Market Division*, 74 YALE L.J. 775 (1965)); *id.* at 33 n.32 (invoking Bork's definition of "ancillary" restraints); *id.* at 43 n.43 (using Bork for the proposition that lack of market power should immunize an ancillary restraint from condemnation).

97. *See* Bork, *supra* note 96, at 474. *See generally* Robert H. Bork, *Ancillary Restraints and the Sherman Act*, 15 ANTITRUST L.J. 211 (1959) [hereinafter Bork, *Ancillary Restraints*].

98. *See* Bork, *supra* note 96, at 403 (defining as "ancillary" agreements that accompany otherwise valid contractual integration and are capable of enhancing

Put in terms familiar to the *NPR* framework, the defendants contended that, whatever their impact on rivalry between venture members, the agreements could also produce "redeeming virtues" and thus should avoid *per se* condemnation.[99] The defendants invoked several decisions, including one involving the National Football League ("NFL"), where lower courts had employed the ancillary restraints doctrine to reject claims by the United States that horizontal restraints that accompanied otherwise lawful ventures were unlawful *per se*.[100] Invoking Taft's and Bork's definition of ancillary, the defendants argued that the challenged restraints could not be unlawful *per se* because they accompanied an otherwise legitimate venture and potentially furthered its lawful purpose.[101]

In particular, the defendants contended that such territorial exclusivity was necessary to induce members to make "substantial investments" in developing private labels in each member's territory and to encourage identification of these brands with members' own chains.[102] Such activities, defendants argued, would enhance interbrand competition by ensuring that venture members could pursue the same private label strategies as integrated chains.[103] The

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the venture's efficiency); *id.* at 469 ("This article has attempted to demonstrate that 'ancillary' may be used as a term of art to denote a restraint which not only accompanies a contract integration but which contributes to its efficiency."); *id.* at 429–36.

99. *See* Brief for Topco, *supra* note 93, at 27–28 (quoting *NPR* test and contending that horizontal territorial allocation that satisfied ancillary test could not be unlawful *per se*); *id.* ("The well-established principle of ancillary restraints, as originally articulated by Judge Taft and developed in later cases, serves to assist courts in a threshold determination of the applicability of per se concepts.").

100. *Id.* at 28–30, 28 n.26 (listing lower court cases employing the ancillary restraints doctrine).

101. *See* Brief for Topco, *supra* note 93, at 22–23 (invoking Bork's position); *id.* at 22, 26 (invoking Taft's distinction between ancillary and naked restraints); *id.* at 33 n.32 (quoting Bork, *supra* note 96, at 474 to define "ancillary"); *see also* Alan J. Meese, *Farewell to the Quick Look: Reconstructing the Scope and Content of the Rule of Reason*, 68 ANTITRUST L.J. 461, 486 (2000) (summarizing the defendants' arguments); Bork, *supra* note 96, at 429–36 (treating territorial restraints that accompanied joint venture between mattress manufacturers as ancillary to larger venture between several manufacturers operating under the same trademark because such restraints helped ensure that venture members could recapture the benefits of their expenditures on "local sales effort"); *id.* (discussing United States v. Sealy, Inc., 1964 Trade Cas. ¶ 79,258 (N.D. Ill. 1964), *rev'd*, United States v. Sealy, 388 U.S. 350 (1967); Denison Mattress Factory v. Spring Air, 308 F.2d 403 (5th Cir. 1962)). Of note, Bork also discussed *Sandura Co. v. Fed. Trade Comm'n*, 339 F.2d 847 (6th Cir. 1964) and *United States v. White Motor Co.*, 194 F. Supp. 562 (N.D. Ohio, 1961), both vertical cases.

102. *See* Brief for Topco, *supra* note 93, at 22–23. *See generally* Meese, *supra* note 101.

103. *See* Brief for Topco, *supra* note 93, at 22–23 ("[Territorial exclusivity] permit[s] each member to undertake the development of his private labels in his

defendants did not assert that restraints were ancillary and thus avoided *per se* condemnation merely because they *accompanied* a legitimate venture.[104] Instead, they asserted that restraints were only ancillary if they could further the "successful operation of a lawful and beneficial arrangement."[105] Nor did defendants claim that ancillary restraints were automatically lawful.[106] Instead, the defendants quoted Bork for the proposition that they lacked sufficient market share to impose competitive harm, thereby defeating any potential case under the rule of reason.[107]

The Court declared the challenged restraints unlawful *per se*.[108] Perhaps ironically, the Court began by quoting the entire *NPR* standard, thereby seemingly reaffirming that the propensity of restraints in a category to produce redeeming virtues precluded *per se* condemnation.[109] Still, the Court rejected defendants' quest for rule of reason treatment, invoking numerous decisions, including *Addyston Pipe*, for what the Court characterized as a longstanding *per se* rule against every horizontal restraint on rivalry.[110] The most telling of such decisions, the Court said, was *United States v. Sealy*,[111]

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trading area and to build an identification of these brands with his stores. If at some future time the value each member would give to his private labels could be appropriated by others and thereby destroyed, the private labels would no longer serve their important competitive purpose. The potential Topco members, who need a private label program truly private like those of his stronger rivals, would be unwilling to undertake the substantial investment in a cooperative program that would not fulfill his need.").

104. *See id.* at 35–42 (making expensive argument that the challenged restraint was ancillary).

105. *Id.*; *see also id.* at 31 (noting that courts should treat restraint as "ancillary" if it is "subsidiary to a lawful beneficial arrangement *and* reasonably related to its operation" (emphasis added)); *id.* (arguing that restraint is ancillary if it is "reasonably related to the successful operation of a lawful and beneficial arrangement"); *id.* at 22 (invoking Bork's definition of ancillary).

106. *See* Bork, *supra* note 96, at 384 ("It follows, of course, that a finding of ancillarity does not render a restraint automatically lawful. The function of the ancillary concept is merely to take the questioned agreement out of the *per se* category and subject it to the Act's remaining tests—market share and intent."). "Market share and intent" were, for Bork, elements of a rule of reason analysis. *Id.*

107. *See* Brief for Topco, *supra* note 93, at 43 n.43 ("The aggregate market share of the parties does not make restriction of output a realistic threat.") (quoting Bork, *supra* note 96, at 474.); *see also* Bork, *supra* note 96, at 388–90 (contending that ancillary restraints entered by firms without market power should be lawful under rule of reason).

108. *See* United States v. Topco Assocs., Inc., 405 U.S. 596, 612 (1972).

109. *Id.* at 607–08.

110. *Id.* at 608 (describing "an agreement between competitors at the same level of the market structure to allocate territories in order to minimize competition" as "[o]ne of the classic examples of a per se violation of [Section] 1").

111. 388 U.S. 350 (1967).

which condemned horizontal territorial restraints that accompanied a joint venture among numerous mattress manufacturers operating under the same trademark.[112] The Court ignored the defendant's argument, echoed by Chief Justice Warren Burger's dissent, that restraints, such as the ones before it and those in *Sealy*, were ancillary and thus avoided *per se* condemnation because they might further the legitimate purposes of the venture by enhancing interbrand rivalry.[113] Thus, the Court deemed all horizontal territorial allocations "naked restraints" and thus unlawful *per se*, regardless of whether such agreements might further otherwise valid integration.[114]

The Court did not question the district court's findings that the restraints would combat free riding, encourage effective promotion of the private label products, and enhance interbrand competition. The district court had erred, the Court said, by thinking "these things [were] relevant."[115] Thus, the Court held that the propensity of horizontal restraints to combat free riding and enhance interbrand competition did not qualify as the sort of redeeming virtue that could save otherwise "anticompetitive" restraints from *per se* condemnation.[116] More precisely, the Court held that the Sherman Act was the "Magna Carta of Free Enterprise" and thus did not allow private parties to foreclose competition in one sector of the economy (presumably intrabrand rivalry between venture members) to increase interbrand competition in the overall retail grocery market.[117]

Implicitly rejecting *Standard Oil*'s focus on monopoly or the consequences of monopoly, the Court announced that the Sherman Act granted individual Topco members the "freedom to compete—to assert . . . whatever economic muscle [they] can muster."[118] This

112. *See id.* 356–57.

113. *See id.* at 356–57 nn.3–4, (describing defendant's argument that such restraints were ancillary); *Topco*, 405 U.S. at 613–14 (Burger, C.J., dissenting) (noting that agreements had an "unquestionably lawful principal purpose" and were "minimal ancillary restraints that are fully reasonable in view of the principal purpose"); *see also* Bork, *supra* 96, at 431–33 (opining that horizontal restraints that accompanied the *Sealy* joint venture were ancillary and properly subject to rule of reason analysis).

114. *See Topco*, 405 U.S. at 608 ("This Court has reiterated time and again that '[h]orizontal territorial limitations . . . are naked restraints of trade with no purpose except stifling of competition.' Such limitations are *per se* violations of the Sherman Act." (quoting White Motor Co. v. United States, 372 U.S. 253, 263 (1963))).

115. *Id.* at 605–06 ("The District Court, considering all these things relevant to its decision, agreed with Topco . . . . [W]e conclude that the District Court used an improper analysis in reaching its result.").

116. *Id.* at 610–11.

117. *Id.* at 610.

118. *Id.*

"freedom" of firms to ignore agreements they entered voluntarily superseded the value of interbrand competition, regardless of whether such competition improved the welfare of consumers by reducing prices, increasing output, or enhancing quality.[119] Nor did it matter that *banning* the agreements would, as a concurring Justice recognized, *reduce* interbrand competition by placing Topco members and similar small chains at a competitive disadvantage vis-à-vis integrated chains when it came to creating and promoting private label brands.[120] Indeed, the Court ridiculed the defendants' contention that courts should ascertain the net economic effects of such restraints, stating that such an approach would require courts to "ramble through the wilds of economic theory," destroying the relative certainty of a *per se* rule.[121]

2. Continental T.V., Inc. v. GTE Sylvania Inc.

Despite *Topco*'s indiscriminate hostility toward horizontal restraints, lower courts continued to apply the ancillary restraints doctrine without attempting to distinguish *Topco*.[122] Just five years later, in *Continental T.V., Inc. v. GTE Sylvania Inc.*,[123] the Court apparently reiterated *Topco*'s broad *per se* rule against horizontal restraints, causing some to doubt whether the decision's rationale would withstand scrutiny.[124] There the Court reconsidered the *per se* ban announced in *United States v. Arnold Schwinn*[125] on nonprice vertical restraints, including exclusive territories and restrictions on

119. *Id.*

120. *Id.* at 612–13 (Blackmun, J., concurring) ("[A]s the District Court's findings make clear, today's decision in the Government's favor will tend to stultify Topco members' competition with the great and larger chains. The bigs, therefore, should find it easier to get bigger and, as a consequence, reality seems at odds with the public interest."). *See generally* Steven C. Salop and David T. Scheffman, *Cost-Raising Strategies*, 36 J. INDUS. ECON. 19, 21–22 (1987) (observing that some firms can disadvantage rivals by inducing captured agency to adopt regulations that impose disproportionate costs on such rivals).

121. *Id.* at 622 (Burger, C.J., dissenting).

122. *See, e.g.*, Lektro-Vend Corp. v. Vendo Co., 660 F.2d 255, 267–69 (7th Cir. 1981) (refusing to invalidate ancillary restraint without mentioning *Topco*); Newburger, Loeb & Co. v. Gross, 563 F.2d 1057, 1082 (2d Cir. 1977) (rejecting *per se* ban on non-compete agreements); Alders v. AFA Corp. of Florida, 353 F. Supp. 654, 658 (S.D. Fla. 1973), *aff'd*, 490 F.2d 990 (5th Cir. 1974) (rejecting claim that horizontal covenant not to compete was unlawful *per se* and evaluating restriction as an ancillary restraint); *see also* Nat'l Soc'y of Pro. Eng'rs v. United States, 435 U.S. 679, 688–90 (1978) (endorsing doctrine of ancillary restraints as applied to employment contracts and sales of a business as proper expositions of *Standard Oil*'s rule of reason).

123. 433 U.S. 36 (1977).

124. *See id.* at 50 n.16.

125. 388 U.S. 365 (1967).

customers to whom dealers and wholesalers could resell.[126] The *Sylvania* Court began its analysis by noting that *Schwinn* had not mentioned the *NPR* standard.[127] The issue before the Court, then, was whether *Schwinn*'s *per se* rule satisfied "the demanding standards of [*NPR*]."[128]

The Court acknowledged that such agreements necessarily reduced rivalry between a manufacturer's dealers.[129] However, recent developments in Industrial Organization, notably Transaction Cost Economics, revealed that such limits on rivalry were sometimes necessary to overcome market failures that would result from reliance upon unbridled markets to conduct economic activity.[130] Echoing the work of Bork and others who had applied these teachings, the Court concluded that such agreements, while departing from a "purely competitive situation," could sometimes produce redeeming virtues.[131] In particular, the Court opined that such restraints could ensure that dealers capture the benefits of promotional expenditures by preventing other dealers from free riding on such investments.[132] While such restraints reduced intrabrand competition, the Court asserted that they could also enhance interbrand competition, which the Court characterized as the primary concern of antitrust law.[133]

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126. Cont'l T.V., Inc. v. GTE Sylvania Inc., 433 U.S. 36, 50 (1977).

127. *Id.* at 51.

128. *Id.* at 50; *see also id.* at 51 ("*Schwinn* announced its sweeping per se rule without even a reference to [*NPR*] and with no explanation of its sudden change in position. We turn now to consider *Schwinn* in light of [*NPR*]."); *id.* at 57 ("We revert to the standard articulated in [*NPR*] . . . for determining whether vertical restrictions must be 'conclusively presumed to be unreasonable, and therefore illegal . . . .'" (quoting N. Pac. Ry. Co. v. United States, 356 U.S. 1, 5 (1958))).

129. *Id.* at 54 ("Vertical restrictions reduce intrabrand competition by limiting the number of sellers of a particular product competing for the business of a given group of buyers.").

130. *See, e.g.*, Meese, *supra* note 35, at 136 (explaining that Transaction Cost Economics "came to presume that complete vertical integration is an attempt to avoid or overcome such market failures, thus assuring the best possible allocation of resources in an imperfect world"); Alan J. Meese, *Robert Bork's Forgotten Role in the Transaction Cost Revolution*, 79 ANTITRUST L.J. 953, 963-981 (2014) (explaining how Bork's contention during the 1960s that courts should assess intrabrand restraints under the rule of reason reflected application of Transaction Cost Economics).

131. *Sylvania*, 433 U.S. at 54–58; *see also id.* at 51–52 ("The market impact of vertical restrictions is complex because of their potential for a simultaneous reduction of intrabrand competition and stimulation of interbrand competition."); *id.* at 54 ("These 'redeeming virtues' are implicit in every decision sustaining vertical restraints under the rule of reason.").

132. *Id.* at 54–56.

133. *Id.* at 54 ("Vertical restrictions promote interbrand competition by allowing the manufacturer to achieve certain efficiencies in the distribution of his products."); *id.* at 52 n.19 ("Interbrand competition is the competition among the

Thus, the Court concluded that a straightforward application of the *NPR* standard required rule of reason treatment for such restraints.[134] The Court suggested that such an assessment would entail "balancing" a restraint's impact upon intrabrand competition against its "simultaneous" impact on interbrand competition.[135] However, *Topco* had rejected such balancing, reasoning that the advancement of interbrand rivalry could not override the freedom of traders.[136]

The Court rejected the administrability argument by explaining that *Topco* involved a horizontal restraint, thereby both seeming to reaffirm the decision and distinguish it from the one at hand.[137] The Court observed that lower courts could differentiate vertical from horizontal restrictions, treating the latter as unlawful *per se* under *Topco*.[138] Finally, without citing *Topco*, the Court concluded that the autonomy of independent businesspeople was not a value of independent significance under the Sherman Act, expressly rejecting arguments to the contrary by dissenting judges in the Ninth Circuit.[139]

3. Broadcast Music, Inc. v. CBS *and* Arizona v. Maricopa Medical Society

Just two years after *Sylvania*, in *Broadcast Music, Inc. v. CBS* ("*BMI*"),[140] the Court evaluated a blanket license—a horizontal

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manufacturers of the same generic product—television sets in this case—and is the primary concern of antitrust law.").

134. *Id.* at 57–59 ("We revert to the standard articulated in [*NPR*].").

135. *Id.* at 57 n.27 (describing plaintiff's "contention that balancing intrabrand and interbrand competitive effects of vertical restrictions is not a 'proper part of the judicial function,'" and observing that *Schwinn* itself had engaged in such balancing when evaluating consignment agreements (quoting Brief for Petitioners at 52, Cont'l T.V., Inc. v. GTE Sylvania Inc., 433 U.S. 36 (1977) (No. 76-15)); *id.* at 51 (noting that such restraints had "simultaneous" impacts on intrabrand and interbrand competition). *See also* HERBERT HOVENKAMP, FEDERAL ANTITRUST POLICY: THE LAW OF COMPETITION AND ITS PRACTICE 268 (1st ed. 1985) ("*Sylvania* . . . require[s] a court to weigh these two effects against each other and determine whether the net result is competitive or anticompetitive.").

136. *See supra* Subpart I.B.1. and accompanying text (recounting *Topco*).

137. *See Sylvania*, 433 U.S. at 57 n.27.

138. *Id.* at 58 n.28.

139. *Id.* at 53 n.21 (rejecting argument by Judge Browning that Sherman Act "was intended to prohibit restrictions on the autonomy of independent businessmen even though they have no impact on 'price, quality, and quantity of goods and services,'" because "[c]ompetitive economies have social and political, as well as economic, advantages, but an antitrust policy divorced from market considerations would lack any objective benchmarks" (quoting GTE Sylvania v. Continental T.V., Inc,, 537 F.2d 980, 1019 (9th Cir. 1976) (*en banc*) (Browning, J. dissenting))).

140. 441 U.S. 1 (1979).

restraint imposed by a society of composers, authors, and publishers.[141] The restraint granted purchasers the right, for a fixed fee, to perform any of the compositions owned by members of the society.[142] The Court conceded that the license was a form of horizontal price fixing that was ordinarily unlawful *per se*.[143] Invoking the *NPR* standard and *Sylvania* reasoning, the Court concluded that the license differed from other forms of price fixing because it could create redeeming virtues by facilitating transactions that would not occur if composers were left to negotiate individually with purchasers.[144]

While the Court did not expressly invoke the term "ancillary," it did assert that the restraint "*accompanie[d]* the integration of sales, monitoring, and enforcement against unauthorized copyright use."[145] The Court also emphasized that the blanket license was a new product that could not exist but for the challenged cooperation and resulting price fixing.[146] While the Court cited *Topco* a few times, it did so only in support of the general standards governing the *per se* rule, without endorsing *Topco*'s application of the *NPR* standard.[147]

In the meantime, scholars wondered whether *Topco* had survived *Sylvania*.[148] The Court answered this question in the affirmative, just two years before *NCAA*, in *Arizona v. Maricopa Medical Society*.[149] There the Court evaluated a horizontal maximum price fixing agreement between physicians that had established a nonprofit venture to provide medical care to insured patients.[150] The district court had invoked *Sylvania* for the proposition that the rule of reason was the preferred method of antitrust analysis, even with respect to horizontal restraints, and rejected plaintiff's contention that the restraints were unlawful *per se*.[151]

Before the Supreme Court, the defendants contended that the agreement would produce significant efficiencies by, for instance, facilitating accurate predictions by health insurance companies regarding future health care expenses and thus the annual liability of such companies.[152] By reducing uncertainty in this manner, the

141. *Id.* at 4.
142. *Id.* at 4–6.
143. *Id.* at 8–10.
144. *Id.* at 20–25.
145. *Id.* at 20 (emphasis added).
146. *Id.* at 21–22.
147. *See, e.g.*, *id.* at 9–10.
148. *See generally, e.g.*, Martin B. Louis, *Restraints Ancillary to Joint Ventures and Licensing Agreements: Do* Sealy *and* Topco *Survive* Sylvania *and* Broadcast Music, 66 VA. L. REV. 879 (1980).
149. 457 U.S. 332 (1982).
150. *Id.* at 335–36.
151. *Id.* at 336 n.2 (describing district court's rationale for rejecting *per se* condemnation of the restraint).
152. *Id.* at 353–54.

restraint could presumably allow the venture participants to engage in more accurate pricing. Accepting the defendants' contentions as true, the Court nonetheless condemned the practice as unlawful *per se*, invoking *Topco* several times with approval.[153] The Court made no effort to distinguish this broad proscription against horizontal restraints from the doctrine of ancillary restraints that lower courts had continued to apply after *Topco*.[154]

II. A SURPRISING REJECTION OF *PER SE* CONDEMNATION: THE SPORTS LEAGUE EXEMPTION

The state of the law in 1984 did not bode well for the NCAA's efforts to defend its horizontal price and output restrictions. To be sure, *Sylvania* had recently held that the rule of reason was the presumptive mode of analysis and reaffirmed the two-part *NPR* test for determining whether a particular category of restraint was unlawful *per se*.[155] *Sylvania* had also endorsed a broader conception of redeeming virtues, rejecting, at least in the vertical context, *Topco*'s holding that the autonomy of traders superseded interbrand competition.[156] Still, *Maricopa* had reaffirmed *Topco*, signaling that the Court still read the category of redeeming virtues narrowly in the case of horizontal restraints.[157] *Sylvania* itself had limited its holding to non-price, vertical restraints, expressly reaffirming *Topco*.[158]

Moreover, the *NCAA* defendants had agreed to reduce the output and increase the price of televised football games.[159] These explicit restraints had a "pernicious" effect on competition, thereby satisfying the first prong of the *NPR per se* test that *Topco* and *Sylvania* had reaffirmed.[160] The redeeming virtues proposed by the defendants—e.g., the supposed propensity of the restraint to enhance the quality

153. *Id.* at 339 ("We must assume that the respondent's version of any disputed issues of fact is correct."); *id.* at 343 (citing *Topco* twice for proposition that judges often lack the expertise necessary to determine the probable impact of a challenged restraint).

154. *See* Nat'l Soc'y of Pro. Eng'rs v. United States, 435 U.S. 679, 688–89 (1978) (endorsing rule of reason treatment of covenants ancillary to the sale of a business because such agreements could "enhanc[e] the marketability of the business itself—and thereby provid[e] incentives to develop such an enterprise"); *supra* note 122 and accompanying text.

155. *See* Cont'l T.V., Inc. v. GTE Sylvania Inc., 433 U.S. 36, 49–50, 57 (1977); *supra* Subpart I.B.2.

156. *See Sylvania*, 433 U.S. at 53–56, 53 n.22.

157. *See Maricopa*, 457 U.S. at 362.

158. *See Sylvania*, 433 U.S. at 57–58 nn.27–28.

159. NCAA v. Bd. of Regents of Univ. of Okla., 468 U.S. 85, 91–95 (1984) (detailing the NCAA's television rights plan, contrasted with a plan devised by the plaintiffs and others that would have "allowed a more liberal number of appearances for each institution, and would have increased the overall revenues realized by [the defendants]").

160. *See supra* notes 44–49 and accompanying text.

of NCAA football *vis-à-vis* competing forms of entertainment—at best seemed indistinguishable from the purported virtue rejected in *Topco*.[161]

Nonetheless, the defendants contended that the restraint was "ancillary" to the larger venture because it ensured greater live attendance and helped maintain a competitive balance between college football teams, thus making the product more attractive to consumers.[162] The United States Court of Appeals for the Tenth Circuit, perhaps giving insufficient weight to *Topco* and *Maricopa*, quoted Bork's ancillary restraint standard, which, of course, *Topco* had rejected.[163] Applying Bork's standard, the court held that the challenged restraints were not ancillary to the venture and declared them unlawful *per se*.[164]

Still, despite the clear case law, the Supreme Court took a surprisingly different approach. Writing for the Court, Justice Stevens acknowledged that horizontal restraints—even those that accompanied lawful ventures and could enhance their success—were generally unlawful *per se*, citing decisions like *Topco* and *Maricopa*.[165] Nonetheless, the Court rejected the plaintiffs' bid for *per se* condemnation.[166] Strangely, the Court did not mention the ancillary restraints doctrine, an odd omission, given that the defendants had invoked the doctrine several times in their relatively short brief and the Tenth Circuit had itself engaged such arguments in detail.[167] Nor did the Court mention the *NPR* test for *per se* illegality or identify any

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161. *See NCAA*, 468 U.S. at 117 (describing defendants' assertion that challenged restraints further competitive balance).

162. Bd. of Regents of Univ. of Okla. v. NCAA, 707 F.2d 1147, 1153–54 (10th Cir. 1983) (recounting the argument that the restraints promote output by protecting live attendance and preserving competitive balance), *aff'd*, 468 U.S. 85 (1984).

163. *Id.* at 1153 (quoting ROBERT H. BORK, THE ANTITRUST PARADOX: A POLICY AT WAR WITH ITSELF 279 (1978), for the proposition that an ancillary restraint is one in which "the parties must be cooperating in an economic activity other than the elimination of rivalry, and the agreement must be capable of increasing the effectiveness of that cooperation and no broader than necessary for that purpose").

164. *See id.* at 1153–54 (finding that the restraint "d[id] not increase the efficiencies of the integration" by increasing overall game viewership, and rejecting the argument that the restraint was ancillary because it could further competitive balance).

165. *See NCAA*, 468 U.S. at 99–100 nn.18–21 (citing *Maricopa* and *Topco* three different times and *Sealy* twice).

166. *Id.* at 101.

167. *Cf. id.* at 117 (opining during rule of reason analysis that maintaining competitive balance was "legitimate and important"); Brief for Petitioner at 12–16, 29–30, NCAA v. Bd. of Regents of Univ. of Okla., 468 U.S. 85 (1984) (No. 83-271); *Bd. of Regents of Univ. of Okla.*, 707 F.2d at 1153–54.

redeeming virtues.[168] Instead, the Court quoted a passage from *BMI* declaring conduct unlawful *per se* if "the practice facially appears to be one that would always or almost always tend to restrict competition and decrease output."[169] Moreover, the Court did not claim that the challenged restraints were themselves necessary to create a new product like those that survived *per se* condemnation in *BMI*.[170]

Instead of identifying possible redeeming virtues that would satisfy the *NPR* test or invoking *BMI*'s "restraint itself as a new product" exception, the Court announced what amounted to an exception to the *NPR* standard. That is, the Court exempted the challenged restraints from *per se* condemnation because the NCAA's members had also entered *other* horizontal restraints, not at issue before the Court, that the Court believed were necessary to make the venture function and thrive.[171] These other restraints, the Court implied, would themselves avoid *per se* condemnation and thus merit rule of reason treatment if challenged separately.[172] As the Court put it:

> [W]e have decided that it would be inappropriate to apply a *per se* rule to this case. This decision is not based on a lack of judicial experience with this type of arrangement, on the fact that the NCAA is organized as a nonprofit entity, or on our respect for the NCAA's historic role in the preservation and encouragement of intercollegiate amateur athletics. Rather, what is critical is that this case involves an industry in which horizontal restraints on competition are essential *if the product is to be available at all*.[173]

Lower courts, including the Ninth Circuit in *Alston*, and scholars have read this language as exempting from *per se* condemnation restraints that accompany a sports league from *per se* condemnation no matter

168. The Court cited *NPR* twice, for propositions unrelated to the test for *per se* illegality. *See NCAA*, 468 U.S. at 104 n.27 (quoting passage stating that the Sherman Act is a "comprehensive charter of economic liberty"); *id.* at 112 n.50 (invoking *NPR* for proposition that a firm that sells a product without any substitutes possesses a monopoly). Moreover, the term "redeeming" does not appear in the majority opinion.

169. *Id.* at 100 (quoting Broad. Music, Inc. v. Columbia Broad. Sys., Inc., 441 U.S. 1, 19–20 (1979)). It should be noted that *BMI* also quoted *NPR* for the proposition that agreements are unlawful *per se* if they "lack . . . any redeeming virtue." *BMI*, 441 U.S. at 8 (quoting N. Pac. Ry. Co. v. United States, 356 U.S. 1, 5 (1958)).

170. *Cf. BMI*, 441 U.S. at 21–22 (holding that challenged restraints could themselves constitute "a different product" resulting in a "substantial lowering of costs" such that *per se* condemnation was improper).

171. *NCAA*, 468 U.S. at 100–02.

172. *See id.*

173. *Id.* at 100–01 (emphasis added).

how harmful such restraints may otherwise appear.[174] The *Alston* Court did not question this reading of *NCAA*, choosing instead to approve, without explanation, the Ninth Circuit's decision to dispense with *per se* condemnation without any threshold identification of redeeming virtues.[175] In this way, the *NCAA* Court was able to avoid automatic condemnation of the challenged restraints without questioning decisions such as *Topco* and *Maricopa*, which had held that horizontal restraints were generally unlawful *per se*.[176] The Court also avoided applying the ancillary restraints doctrine.[177] *BMI*, of course, had opined that restraints necessary to create a new product would themselves be analyzed under the rule of reason.[178] However, *NCAA* cited no authority for the proposition that a restraint could survive *per se* condemnation because *other restraints* not before the Court were necessary to create a venture or help it thrive.[179]

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174. *See In re* NCAA Athletic Grant-in-Aid Cap Antitrust Litig., 958 F.3d 1239, 1256 (9th Cir. 2020), *aff'd sub nom* NCAA v. Alston, 141 S. Ct. 2141 (2021); *In re* NFL's Sunday Ticket Antitrust Litig., 933 F.3d 1136, 1150 n.5 (9th Cir. 2019); O'Bannon v. NCAA, 802 F.3d 1049, 1069 (9th Cir. 2015); Law v. NCAA, 134 F.3d 1010, 1017–19 (10th Cir. 1998); Smith v. NCAA, 139 F.3d 180, 186 (3d Cir. 1998); Hovenkamp, *supra* note 10, at 325–26 (reading *NCAA* in this manner and explaining that *NCAA*'s exemption from *per se* condemnation would apply even to an agreement between member schools should they "fix the price of admission tickets or for hot dogs purchased in the stands"); Alan J. Meese, *Competition and Market Failure in the Antitrust Jurisprudence of Justice Stevens*, 74 FORDHAM L. REV. 1775, 1791–92 (2006); *see also* SCFC ILC, Inc. v. VISA USA, Inc., 36 F.3d 958, 963–64 (10th Cir. 1994) (invoking this aspect of *NCAA* outside the sports league context).

175. *Alston*, 141 S. Ct. at 2157–58.

176. See *NCAA*, 468 U.S. at 99–100 nn.18–21 (invoking *Maricopa*, *Topco,* and *Sealy*).

177. *See Alston*, 141 S. Ct. at 2155–58.

178. Broad. Music, Inc. v. Columbia Broad. Sys., Inc., 441 U.S. 1, 20–24 (1979).

179. The Court did invoke the views of Robert Bork to the effect that some joint action was necessary to make a sports league function. *See NCAA*, 468 U.S. at 101 ("[S]ome activities can only be carried out jointly. Perhaps the leading example is league sports. When a league of professional lacrosse teams is formed, it would be pointless to declare their cooperation illegal on the ground that there are no other professional lacrosse teams." (quoting BORK, *supra* n.163, at 278)). However, Bork did not suggest that *any* restraints that accompanied such a venture thereby avoided *per se* condemnation. Instead, he opined that such a venture and restraints that "make it efficient" should be "completely lawful," thereby implying an assessment of whether particular restraints could enhance the venture's output. BORK, *supra* n. 163, at 279. In the same way, Bork had previously concluded that restraints that accompanied a joint venture could be unlawful *per se* if they could not contribute to a venture's efficiency. *See supra* notes 96–98 and accompanying text. Thus, Bork's analytical framework contemplated that some restraints that accompanied the formation of a sports league could be unlawful *per se*.

The Court then identified the sorts of *other* horizontal restraints, not before it, that were necessary to make the NCAA function and thrive. The point of the NCAA, the Court said, was to create a sports league and athletic competition that was attractive to potential fans and viewers and to provide a product that competed with offerings by other sports leagues.[180] Quoting Bork, the Court observed that some horizontal cooperation was necessary to create such league competition in the first place. For instance, member schools had to agree on rules of the game, including the number of players on a team, the size of the field, and "the extent to which physical violence is to be encouraged or proscribed," all of which, the Court said, "restrain[ed] the manner in which institutions compete."[181]

The Court then shifted focus from restraints necessary to the very existence of the venture to a second group that helped the venture thrive in competition with other live entertainment. The Court noted that the venture sought to market a brand of football associated with an academic tradition.[182] This association, the Court said, differentiated the product in the minds of fans from other, analogous athletic competition.[183] To preserve the academic and amateur nature of the product, the Court said, member schools had to agree that players were bona fide students, attended class, and were not paid salaries like professional athletes.[184] The agreement not to pay players, of course, was an explicit horizontal agreement on the price of inputs, analogous to an agreement between schools on how much to pay coaches, referees, or beer vendors.[185]

Without such agreements, the Court said, each member institution would find it in its individual interest to pay players more than the cost of attendance and water down academic requirements.[186] Each individual school, of course, would only internalize a fraction of the negative impact of such decisions upon the brand of NCAA college football.[187] The collective result of such individual decisions would transform bona fide college football into

180. *See NCAA*, 468 U.S. at 101–02 (suggesting that quality of NCAA football was comparable to that of "minor league baseball").

181. *Id.* at 101; *see also* BORK, *supra* note 163, at 279.

182. *NCAA*, 468 U.S. at 101–02.

183. *Id.*

184. *Id.* at 102. The Court's admonition that players "must not be paid," is ambiguous on its face and could nominally refer to a ban on athletic scholarships, period. However, lower courts and scholars have read this language to refer to the payment over and above the rough cost of attendance, that is, tuition, room, board, and other expenses of matriculation.

185. *See* Law v. NCAA, 134 F.3d 1010, 1022–24 (10th Cir. 1998) (condemning agreement on coach's salaries after rule of reason analysis).

186. NCAA v. Alston, 141 S. Ct. 2141, 2148 (2021).

187. *See* Alan J. Meese, *Market Failure and Non-Standard Contracting: How the Ghost of Perfect Competition Still Haunts Antitrust*, 1 J. COMPETITION L. & ECON. 21, 27–29 (2005).

semi-professional football with less appeal to fans.[188] However, *Topco* had rejected an analogous claim that a horizontal restriction was necessary to overcome a market failure in the form of suboptimal promotion.[189]

Instead of reiterating *Topco*, however, the Court invoked *Sylvania* for the proposition that "a restraint in a limited aspect of a market may actually enhance market-wide competition."[190] Moreover, the Court invoked the (unsurprising) concession by the plaintiffs—the University of Oklahoma and the University of Georgia—that "the great majority of the NCAA's regulations enhance competition among member institutions."[191] Put more technically, the Court asserted that unbridled rivalry between member schools in the market for players would result in a market failure, a deterioration in the quality of the venture's product, and a reduction in interbrand competition.[192] The contractual limits on such rivalry thus ameliorated the failure and increased the value of the NCAA's output.[193] At the same time, the Court softened any claim that this second set of restraints was strictly necessary to the venture's survival, stating only that without these restraints, the product was one "*which might otherwise be unavailable*."[194]

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188. *See NCAA*, 468 U.S. at 101–02 ("The identification of this 'product' with an academic tradition differentiates college football from and makes it more popular than professional sports to which it might otherwise be comparable, such as, for example, minor league baseball. In order to preserve the character and quality of the 'product,' athletes must not be paid, must be required to attend class, and the like. And the integrity of the 'product' cannot be preserved except by mutual agreement; if an institution adopted such restrictions unilaterally, its effectiveness as a competitor on the playing field might soon be destroyed.").

189. *See supra* notes 93–121 and accompanying text (describing this aspect of *Topco*).

190. *NCAA*, 468 U.S. at 103 (citing Cont'l T.V., Inc. v. GTE Sylvania Inc., 433 U.S. 36, 51–57 (1977)).

191. *Id.*

192. *See* Meese, *supra* note 174, at 1792–93. *But cf.* Gabe Feldman, *A Modest Proposal for Taming the Antitrust Beast*, 41 PEPP. L. REV. 249, 257–62 (2014) (premising reform proposal upon repeated assertion that the rationale for such restrictions is a social welfare justification of the sort that courts generally treat as non-cognizable for antitrust purposes). Professor Feldman does not, however, engage with the possibility that removal of such restrictions would result in a market failure and deterioration in the quality of the NCAA's product. *See infra* notes 352–58 and accompanying text (describing market failure rationale in greater detail).

193. Some lower courts have characterized this language as dicta. *See In re* NCAA Athletic Grant-in-aid Cap Antitrust Litig., 958 F.3d 1239, 1246 (9th Cir. 2020) (quoting O'Bannon v. NCAA, 802 F.3d 1049, 1063 (9th Cir. 2015)).

194. *See NCAA*, 468 U.S. at 102 (emphasis added) ("Thus, the NCAA plays a vital role in enabling college football to preserve its character, and as a result enables a product to be marketed which might otherwise be unavailable."). *But see* Law v. NCAA, 134 F.3d 1010, 1017 (10th Cir. 1998) (citing *NCAA*, 468 U.S.

The Court's analysis assumed that the restraints not before it were themselves concerted action and thus fully subject to Section 1.[195] Each such restraint reduced or eliminated certain forms of rivalry between erstwhile competitors and thus produced a pernicious effect on competition within the meaning of the *NPR* test.[196] Still, the Court apparently believed that such restraints would avoid *per se* condemnation and thus merit rule of reason treatment, presumably because they were capable of producing one or more redeeming virtues.[197] Indeed, lower courts have, for instance, treated the propensity of a restraint to foster competitive balance as a cognizable antitrust benefit.[198]

III. THE COURT'S FAILED SPORTS LEAGUE EXEMPTION

NCAA's analysis of the *per se* question reads like an effort to achieve two distinct objectives: (1) rule of reason treatment for the restraints actually before the Court, despite the failure to identify any potential redeeming virtues and refusal to apply the ancillary restraints test, and (2) preservation of those precedents, particularly *Sealy*, *Topco*, and *Maricopa*, that seemed to require summary condemnation of horizontal restraints, including those apparently capable of producing redeeming virtues.[199] By its terms, *NCAA*'s exemption protected any restraint adopted by sports leagues from *per se* condemnation. Restraints that found shelter in this new exemption ranged from those that could produce no possible competitive virtues to those that would have avoided *per se* condemnation anyway under

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at 100–01) (opining that the horizontal restraints necessary for college basketball to exist include rules such as those forbidding payments to athletes and those requiring athletes to attend class).

195. *See NCAA*, 468 U.S. at 99 ("The NCAA is an association of schools which compete against each other to attract television revenues, *not to mention fans and athletes*. As the District Court found, the policies of the NCAA with respect to television rights are ultimately controlled by the vote of member institutions." (emphasis added)); *id.* at 101 (stating that "horizontal restraints on competition are essential if the product is to be available at all"); *cf.* Copperweld Corp. v. Indep. Tube Corp., 467 U.S. 752, 777 (1984) (holding that cooperation within a single firm does not constitute concerted action subject to Section 1 of the Sherman Act). *But see* BORK, *supra* note 163, at 280 (suggesting that cooperation necessary to bring venture into existence should be lawful *per se*).

196. *See NCAA*, 468 U.S. at 99.

197. *Id.* at 100.

198. *See, e.g.*, *O'Bannon*, 802 F.3d at 1059 (treating maintenance of competitive balance as a cognizable benefit but finding the challenged restraint could not produce such a benefit); *Law*, 134 F.3d at 1023–24 (treating maintenance of competitive balance as a cognizable benefit but finding that the challenged restraint did not further that objective).

199. It should be noted that Justice Stevens had authored the *Maricopa* decision two terms before.

a proper application of the *NPR* standard because they *could* produce redeeming virtues.[200]

If consistently applied, this regime would have three important procedural consequences for plaintiffs challenging restraints imposed by sports leagues. First, plaintiffs would bear the initial burden of demonstrating economic harm sufficient to establish a prima facie case, no matter how obviously harmful the restraint might be. Plaintiffs in rule of reason cases fail to make such a showing ninety-seven percent of the time.[201] Presumably, some potential plaintiffs understanding these probabilities do not attempt such a showing in the first place, leaving some harmful restraints unchallenged. Moreover, establishing a prima facie case is not free, with the result that some plaintiffs with a strong case will abjure such a challenge. In short, the sports league exemption will likely increase the number of "false negatives"; that is, harmful restraints that courts do not condemn.[202]

Second, courts would presumably define the content of such a prima facie showing without regard to the type of benefits a restraint might produce, insofar as the exemption from *per se* condemnation does not turn on the nature of any possible redeeming virtues.[203] Third, if the defendant does adduce evidence of cognizable benefits after a plaintiff makes out a prima facie case, then the plaintiff would retain the burden of proving that harms outweigh benefits or that a less restrictive means would achieve identical benefits to the challenged restraint.[204]

This Part explains that *NCAA* announced a regime of *per se* liability that is both underinclusive and overinclusive, banning outright some restraints that may produce redeeming virtues while simultaneously declining to ban others that courts should condemn. This Part also shows how *NCAA* contained the seeds of its own destruction, by invoking reasoning that would require reversal of decisions such as *Sealy*, *Topco*, and *Maricopa*—decisions *NCAA* struggled to save. *Alston* provided the Court with a rare opportunity to correct *NCAA*'s erroneous application of the *NPR* standard,

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200. The rule would also shelter classic ancillary restraints adopted by such ventures that would have survived even the broad application of the *per se* rule articulated in *Topco*. *See supra* notes 122–54 and accompanying text (collecting post-*Topco* decisions applying the ancillary restraints doctrine).

201. *See* Michael A. Carrier, *The Rule of Reason: An Empirical Update for the 21st Century*, 16 GEO. MASON L. REV. 827, 827–29, 837 (2009).

202. *See* Meese, *supra* note 12, at 77–79.

203. *See supra* notes 58–70 and accompanying text (describing how rigorous application of the second prong of the *NPR* test can inform subsequent rule of reason analysis); *cf.* Meese, *supra* note 63, at 518–20 (contending that requirements for establishing a prima facie case should turn on nature of the "redeeming virtues" that thwart *per se* condemnation).

204. *See, e.g.*, Realcomp II, Ltd. v. Fed. Trade Comm'n, 635 F.3d 815, 825–26 (6th Cir. 2011) (describing these aspects of rule of reason analysis).

including that the Court's apparent embrace of decisions, such as *Topco*, *Sealy*, and *Maricopa*, confirms that *Sylvania*'s account of redeeming virtues applies in the horizontal context and ensures that courts and agencies judge restraints adopted by sports leagues under the same standards as those restraints adopted by other ventures.[205] However, the *Alston* Court declined to address any of these questions, leaving *NCAA*'s resolution of them in place.

A. The Court's Rationale for the Sports League Exemption Contradicted Basic Antitrust Principles

The Court's rationale for exempting the restraints before it from *per se* condemnation contradicted basic antitrust principles, including the *NPR* standard and parallel doctrine of ancillary restraints.[206] Courts have employed the ancillary restraints doctrine for over a century to test the validity of agreements that accompany other integration that is economically necessary to create a joint venture or firm.[207] Under this doctrine, courts have condemned restraints that accompany a joint venture if they do not appear capable of furthering legitimate objects of the venture.[208] Such a finding is indistinguishable from a conclusion that the restraint cannot produce redeeming virtues under the *NPR* test.

Innumerable economic ventures entail cooperation between individuals or entire firms that might otherwise engage in unbridled competitive rivalry. For instance, two lawyers in close proximity may engage in cutthroat competition today only to form a partnership next month. While such a venture eliminates rivalry for a time, each partner is generally free to leave the firm and recommence such rivalry whenever he or she may please, absent some agreement to the contrary.[209] While ongoing, the partnership entails various forms of cooperation by former, but still potential, rivals. Such cooperation extends to matters such as price setting, joint purchasing, product positioning, and the division of labor between partners.[210] This

205. *See* Meese, *supra* note 12 at 84 (contending that the Court should order re-argument so as to address these issues).

206. *See* Cont'l T.V., Inc. v. GTE Sylvania Inc., 433 U.S. 36, 49–51 (1977).

207. *See, e.g.*, United States v. Addyston Pipe & Steel Co., 85 F. 271 (6th Cir. 1898) (Taft, J.) (articulating this doctrine and opining that challenged restraints violated the Sherman Act, regardless of whether they set reasonable prices, because they were not ancillary).

208. *See supra* notes 56–70 and accompanying text.

209. *Cf.* REVISED UNIF. P'SHIP ACT, § 409(b)(3) (Nat'l Conf. of Comm'rs on Unif. State Ls. 1997) (articulating duty of a current partner to refrain from competing with the partnership).

210. BORK, *supra* note 163, at 265 ("A law firm is composed of lawyers who could compete with one another but who have instead eliminated rivalry and integrated their activities in the interest of more effective operation. Not only are partners and associates frequently forbidden to take legal business on their own (Taft's example of a valid ancillary restraint), but the law firm operates on

cooperation is every bit as necessary to create and sustain a partnership as the restraints *NCAA* invoked as necessary to create and sustain a sports league.[211]

The formation of such a partnership is presumptively lawful, subject only to standards governing horizontal mergers.[212] Moreover, once lawfully formed, coordinated interaction between members of the partnership—a single entity for Sherman Act purposes—is immune from Section 1 scrutiny.[213] According to the rationale for *NCAA*'s sports league exception, the presumed legality of such cooperation between parties should immunize other forms of cooperation from *per se* condemnation.[214] But this result does not comport with antitrust doctrine, informed by modern developments in economic theory. Instead, the *NPR* standard requires courts to assess whether such additional cooperation may promote redeeming virtues. Moreover, the whole point of the Sherman Act's version of the ancillary restraints doctrine is to ascertain which forms of cooperation outside the venture may further the venture's legitimate objects and which merely reduce rivalry for its own sake and are thus nonancillary.[215]

Both before and after *NCAA*, lower federal courts, scholars, and the Federal Trade Commission fashioned and applied such a test.[216] These tribunals announced standards that would condemn restraints that, while coinciding with the formation of a legitimate venture, had no prospect of producing cognizable benefits.[217] Nearly ninety years

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the basis of both price-fixing and market-division agreements. The partners agree upon the fees to be charged for each member's and associate's services (which is price fixing) and usually operate on a tacit, if not explicit, understanding about fields of specialization and primary responsibility for particular clients (both of which are instances of market division).").

211. *Cf.* Arizona v. Maricopa Cnty. Med. Soc'y, 457 U.S. 332, 357 (1982) (stating that price fixing between partners in a partnership is "perfectly proper").

212. *See* Broad. Music, Inc., v. Columbia Broad. Sys., Inc., 441 U.S. 1, 23 (1979) ("Mergers among competitors eliminate competition, including price competition, but they are not *per se* illegal . . . .").

213. *See* Copperweld Corp. v. Indep. Tube Corp., 467 U.S. 752, 771 (1984).

214. NCAA v. Bd. of Regents of Univ. of Okla., 468 U.S. 85, 117–19 (1984).

215. *See* Bork, *Ancillary Restraints*, *supra* note 97, at 219 (explaining that some restraints deemed ancillary at common law should not be deemed ancillary for Sherman Act purposes, given the latter's focus on a restraint's "impact on competition").

216. Rothery Storage & Van Co. v. Atlas Van Lines, Inc., 792 F.2d 210, 227–30 (D.C. Cir. 1986); *see* BORK, *supra* note 163, at 279 (explaining that horizontal cooperation, even if not essential, may be lawful under certain conditions); *In re* Brunswick Corp., 94 F.T.C. 1174, 1245–49 (1979), *aff'd*, 657 F.2d 971 (8th Cir. 1981) (weighing "precompetitive effects" of a joint venture with "anticompetitive effect[s]").

217. *See, e.g.*, *Rothery Storage & Van Co.*, 792 F.2d at 224 ("To be ancillary, and hence exempt from the per se rule, an agreement eliminating competition must be subordinate and collateral to a separate, legitimate transaction. The

before *NCAA*, then-Judge Taft described this doctrine as it applied to the formation of a partnership.[218] According to Taft, "restrictions in the articles of partnership upon the business activity of the members, with a view of securing their entire effort in the common enterprise" were ancillary and "to be encouraged."[219]

Taft did not, however, state that *any* restraint between the partners was presumptively reasonable.[220] Instead, he made it plain that rule of reason analysis was only appropriate where the proponent of the restraint identified how the agreement might further some main purpose of the venture to which the restraint was supposedly ancillary.[221] Restraints that accompanied a partnership, for instance, were only ancillary when made "*with a view of securing*

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ancillary restraint is subordinate and collateral in the sense that it serves to make the main transaction more effective in accomplishing its purpose. *Of course, the restraint imposed must be related to the efficiency sought to be achieved*." (emphasis added)); Polk Bros. v. Forest City Enters., Inc., 776 F.2d 185, 189 (7th Cir. 1985) ("A restraint is ancillary when it may contribute to the success of a cooperative venture that promises greater productivity and output."); Lektro-Vend Corp. v. Vendo Co., 660 F.2d 255, 265–67 (7th Cir. 1981) (evaluating plaintiff's claims that non-compete agreements contemporaneous with a merger were solely designed to eliminate plaintiff as a competitor and thus not ancillary); *In re Brunswick Corp.*, 94 F.T.C. at 1275 (explaining that "to be legitimately ancillary to a joint venture," agreements "must be limited to those inevitably arising out of the dealings between partners, or necessary (and of no broader scope than necessary) to make the joint venture work"); *id.* at 1277 (invalidating agreement restricting competition between the parties in certain markets because it "goes beyond anything that might reasonably be required to further a legitimate object of the joint venture" and governs "a subject outside the ambit of the joint venture," and is "on its face, a naked agreement between horizontal competitors"); Denison Mattress Factory v. Spring-Air Factory, 308 F.2d 403, 409 (5th Cir. 1962) (holding that exclusive territories were ancillary to manufacturer's otherwise valid trademark licensing scheme); Bascom Launder Corp. v. Telecoin Corp., 204 F.2d 331, 335 (2d Cir. 1953).

218. *See* United States v. Addyston Pipe & Steel Co., 85 F. 271, 280 (6th Cir. 1898).

219. *See id.*; *see also* Matthews v. Associated Press of N.Y., 32 N.E. 981, 983 (N.Y. 1893) ("A business partnership could provide that none of its members should attend to any business other than that of the partnership, and that each partner who came in must agree not to do any other business and must give up such business as he had theretofore done. Such an agreement would not be in restraint of trade, although its direct effect might be to restrain to some extent the trade which had been done.").

220. *See Addyston Pipe & Steel Co.*, 85 F. at 281, 283.

221. *See id.* at 279–83; BORK, *supra* note 163, at 279 ("[T]he parties must be cooperating in an economic activity other than the elimination of rivalry, and the agreement must be capable of increasing the effectiveness of that cooperation . . . ."). Bork also added that, to survive scrutiny, the agreement must also "be no broader than the need it serves" to achieve the benefits in question. *See also id.* at 266 ("By ancillary Taft meant that the agreement was subordinate to the main transaction, the partnership, and contributed to its efficiency.").

their entire effort in the common enterprise."[222] Thus, the test functioned in the same way as the two-part *NPR* test, turning, as it did, on whether the challenged restraint could possibly produce efficiency benefits.[223]

Robert Bork, who rehabilitated Taft's test, expressly opined that some horizontal restraints that accompanied completely valid joint ventures or transactions would fail the ancillary restraints test because the agreements could not conceivably produce benefits that furthered the efficiency of the venture.[224] All such agreements reduced rivalry between the parties to them, with the result that summary condemnation or not turned on whether the agreements augured to produce benefits of the sort that would justify rule of reason scrutiny instead of *per se* condemnation.[225] But, summary condemnation was available, even though some horizontal cooperation between rivals was necessary to create and sustain the ventures that the challenged restraints accompanied.[226] By contrast, *NCAA* dispensed with any such assessment, declaring all such restraints exempt from *per se* condemnation, even when the restraints are manifestly anticompetitive and appear incapable of furthering the legitimate purposes of the venture they accompany.[227]

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222. *See Addyston Pipe & Steel Co.*, 85 F. at 280 (emphasis added).

223. *See supra* notes 20–22 and accompanying text (explaining that outcomes under the *NPR* test turned on the presence or not of possible redeeming virtues).

224. *See* Bork, *supra* note 96, at 383 (identifying as nonancillary "agreements not to compete which are incapable of adding to the efficiency of the integration which they seemingly accompany"); *id.* ("Thus, a market-division agreement between competitors who jointly maintain a product safety testing laboratory could not be related to the efficiency of the joint laboratory."); *see also* Bork, *Ancillary Restraints*, *supra* note 97, at 219 (opining that some covenants enforceable at common law could not produce benefits cognizable under the Sherman Act and were thus not properly considered "ancillary" for antitrust purposes); Rothery Storage & Van Co. v. Atlas Van Lines, Inc., 792 F.2d 210, 224 (D.C. Cir. 1986) (Bork, J.) ("Of course, the restraint imposed must be related to the efficiency sought to be achieved.").

225. *See* Polk Bros., Inc. v. Forest City Enters., Inc., 776 F.2d 185, 189 (7th Cir. 1985) ("The evaluation of ancillary restraints under the Rule of Reason does not imply that ancillary agreements are not real horizontal restraints. They are. A covenant not to compete following employment does not operate any differently from a horizontal market division among competitors—not at the time the covenant has its bite anyway. The difference comes at the time people enter beneficial arrangements.").

226. *See, e.g.*, *In re* Brunswick Corp., 94 F.T.C. 1174, 1275 (1979), *aff'd*, 657 F.2d 971 (8th Cir. 1981). For a post-*NCAA* example of such condemnation, see Polygram Holding, Inc. v. F.T.C., 416 F.3d 29, 37–38 (D.C. Cir. 2005) (holding that a restraint that accompanied otherwise legitimate venture could produce no cognizable benefits and thus violated Section 1).

227. *See* Hovenkamp, *supra* note 10, at 324–26 (noting and questioning this aspect of the decision).

Some may question the usefulness of the analogy between restraints ancillary to a partnership and the restraints before the Court in *NCAA*. After all, cooperation within partnerships—what scholars once called "close knit combinations"[228]—is effectively beyond Section 1 scrutiny and is instead treated as unilateral conduct subject only to the very forgiving standard of Section 2.[229] By contrast, the restraints not at issue before the Court but invoked by *NCAA* as necessary to make the venture survive and thrive apparently entailed concerted action as courts have defined the concept under the Sherman Act, given the continuing independent status of the various colleges and universities that were members of the NCAA.[230] Thus, one might say, the "necessary" restraints invoked by *NCAA* were more analogous to the challenged restraints actually before the Court than were the activities of a fully-integrated partnership, whose unilateral actions would fall outside the purview of Section 1. If so, perhaps the *NCAA* Court was right to immunize from *per se* condemnation any restraint that accompanied a venture that required other forms of potentially reasonable concerted action (and not simply unilateral action) to function.

However, any distinction between restraints ancillary to fully integrated entities like partnerships, on the one hand, and those ancillary to joint ventures that constitute concerted action, on the other hand, is illusory for two reasons. First, as Robert Bork explained over fifty years ago, and eighteen years before *NCAA*, there is no *a priori* categorical *economic* distinction between a "loose-knit combination," i.e., a joint venture like the NCAA or Topco, and a

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228. *See, e.g.*, *The Rule of Reason and the Per Se Concept*, *supra* note 97, at 383 n.25 (defining distinction between "close-knit" and "loose" combinations).

229. *See* Copperweld Corp. v. Indep. Tube Corp., 467 U.S. 752, 775–77 (1984) (holding that agreements between two wholly-owned subsidiaries did not constitute a "contract, combination or conspiracy" within the meaning of Section 1); *see also* Alan J. Meese, *Intrabrand Restraints and the Theory of the Firm*, 83 N.C. L. REV. 5, 19–26 (2004) (explaining how intrafirm price fixing falls outside the purview of Section 1, regardless of firm's market power); *cf.* Arizona v. Maricopa Cnty. Med. Soc'y, 457 U.S. 332, 357 (1982) (stating that price fixing between partners in a partnership is "perfectly proper"); Broad. Music, Inc. v. Columbia Broad. Sys., Inc., 441 U.S. 1, 9 (citing United States v. Addyston Pipe & Steel Co., 85 F. 271, 280 (6th Cir. 1898)) ("When two partners set the price of their goods or services, they are literally 'price-fixing,' but they are not *per se* in violation of the Sherman Act.").

230. *See, e.g.*, American Needle, Inc. v. NFL, 560 U.S. 183, 186–201 (2010) (holding that conduct of separate corporation jointly owned by thirty-two NFL teams was concerted action because the agreement joined "independent centers of decision making"); Rothery Storage & Van Co. v. Atlas Van Lines, Inc., 792 F.2d 210, 214–15 (D.C. Cir. 1986) (holding that price-fixing agreement ancillary to joint venture constituted concerted action under Section 1 where venture's board of directors were all actual or potential competitors of the venture); *id.* (invoking *NCAA* and *Topco* to support this determination).

"close-knit combination," such as a partnership or corporation.[231] Both types of entities entail voluntary horizontal cooperation with the potential to reduce economic rivalry that might otherwise occur but also enhance economic productivity and interbrand rivalry. The variety of ownership structures among sports leagues helps exemplify this point.[232] Current law's treatment of partnerships as unilateral actors rests upon functional considerations suggesting that continuing rule of reason scrutiny of such ongoing collaboration would do more harm than good.[233] Still, there is no economic reason to treat restraints that *accompany* a loose-knit combination any differently from those that accompany a close-knit combination.

Second, as a formal matter, courts have repeatedly invoked the ancillary restraints doctrine in cases where the restraints accompanied a joint venture (loose-knit combination) between two otherwise independent entities, as in *NCAA*.[234] Indeed, as noted earlier, the Tenth Circuit took such an approach in *NCAA* itself, embracing Bork's definition of ancillary and rejecting defendants' arguments that the challenged restraints were ancillary and thus not unlawful *per se*.[235] In particular, the court determined that, even

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231. *See* Bork, *supra* note 96, at 472 (citing R.H. Coase, *The Nature of the Firm*, 4 ECONOMICA 381 (1937)) ("[A] contract integration is as much a firm as an ownership integration."); *see also* Meese, *supra* note 130, at 963–64, 972 (explaining how Bork applied the logic of Coase's "Nature of the Firm" to contend that contractual and complete economic integration were economically indistinguishable means of achieving identical economic objectives).

232. *See* Chi. Pro. Sports Ltd. v. Nat'l Basketball Ass'n, 95 F.3d 593, 600 (7th Cir. 1996) (discussing different judicial characterizations of sports leagues for Section 1 purposes); *id.* ("Sports are sufficiently diverse that it is essential to investigate their organization and ask [whether they constitute concerted action] one league at a time . . . .").

233. *See* Meese, *supra* note 229, at 9 ("Thus, the concept of 'unilateral conduct' by an indivisible entity embraced by antitrust courts is in fact a social construction–the product of an institutional framework favorable to cooperation that occurs 'within' a business firm."); *see also* 7 PHILLIP AREEDA & HERBERT HOVENKAMP, ANTITRUST LAW ¶1476a-d (2013) (discussing considerations supporting treatment of ongoing collaboration between partners as unilateral conduct); *id.* at ¶ 1475b ("[W]e can often classify wisely only by judging which set of substantive standards—those governing concerted or unilateral action—best promotes competition and fair and effective antitrust administration in a particular case or class of cases.").

234. *See, e.g.*, SCFC ILC, Inc. v. Visa USA, Inc., 36 F.3d 958, 964–68 (10th Cir. 1994); Polk Bros., Inc. v. Forest City Enters., Inc., 776 F.2d 185, 187–90 (7th Cir. 1985) (invoking doctrine to evaluate restraints that accompanied formation of joint venture between two otherwise independent stores that sold "goods for furnishing and maintaining a home"); Nat'l Bancard Corp. v. Visa U.S.A., Inc., 779 F.2d 592, 599, 601, 603, 605 (11th Cir. 1986); *In re* Brunswick Corp., 94 F.T.C. 1174, 1275 (1979), *aff'd*, 657 F.2d 971 (8th Cir. 1981).

235. *See* Bd. of Regents of Univ. of Okla. v. NCAA, 707 F.2d 1147, 1153 (10th Cir. 1983) (embracing Bork's definition); *id.* at 1153 (rejecting NCAA's argument

though the challenged restraints accompanied an otherwise valid venture, the NCAA's price and output restraints could not produce the type of efficiencies recognized by antitrust law, with the result that the restraints were not ancillary.[236] This holding was also tantamount to the conclusion that the proffered benefits were not "redeeming virtues" within the meaning of the *NPR* standard.

B. NCAA*'s Rationale Did Not Distinguish* Topco

Even if *NCAA*'s sports league exemption made sense as a matter of antitrust first principles, the exemption's rationale did not actually distinguish restraints that *Topco* and other decisions had summarily condemned. Instead, this rationale "proved too much," undermining the decisions the Court purported to save.[237] Like the NCAA, the Topco venture was itself lawful and likely procompetitive. Indeed, on remand, the district court approved a less restrictive alternative to the challenged restraint, leaving the venture otherwise entirely intact, and the Supreme Court affirmed.[238]

Moreover, and again like the NCAA, the Topco venture entailed various other types of horizontal cooperation subject to Section 1 that were necessary to create the venture and make it work. Venture members—actual or potential rivals—created the venture, owned equal shares of the enterprise, and elected officers of venture members to its Board of Directors.[239]

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that restraints were ancillary "because the restraints promote the effectiveness of the cooperation by protecting live attendance at games and by promoting competitive balance, thereby improving the excitement of and the interest in both televised and live games").

236. *Id.* at 1154 (rejecting claim that restraint was ancillary because it furthered "competitive balance" because "[n]oneconomic considerations, however worthy, cannot be used to justify restraints that adversely affect competition"); *id.* (citing Nat'l Soc'y of Eng'rs v. Pro. Eng'rs, 435 U.S. 679, 689, 696 (1978)) ("[T]he argument that the restraints are necessary to promote athletic balance shades into the argument that competition will destroy the market. The Sherman Act will not countenance an argument that the nature of a product or an industry structure is such that something other than competition is desirable."). Of course, other courts subsequently recognized that furthering competitive balance can constitute a redeeming virtue. *See supra* note 198 (collecting decisions to this effect); *NCAA*, 468 U.S. at 117 (opining that maintaining competitive balance is "legitimate and important"). However, these subsequent decisions do not undermine the Tenth Circuit's more general holding that a restraint cannot be ancillary unless the proponent of the agreement identifies one or more possible ways that the restraint might further the underlying venture by generating cognizable benefits.

237. *See supra* note 122 (identifying various approving citations of *Topco*).

238. *See* United States v. Topco Assocs., Inc., 1973-1 Trade Cas. P.74,485, at *1–5 (N.D. Ill. 1973), *aff'd*, 414 U.S. 801 (1973).

239. United States v. Topco Assocs., Inc., 405 U.S. 596, 598, 602 (1972).

The Board, in turn, appointed the venture's officers, again from among the ranks of venture members.[240] These officers and board members ran the venture, making various collective (horizontal) determinations impacting competition between venture members.[241]

Thus, the Topco venture necessarily determined what private label products the venture would offer, the quality of such products, how to brand the products,[242] who could join the venture and thus purchase the products,[243] the price and output at which the venture would sell the products to venture members,[244] and charges to support operation of the venture.[245] The venture also bargained with suppliers of the Topco-label products, presumably playing potential suppliers against each other in an effort to obtain the lowest quality-adjusted price possible.[246] Such cooperation was "concerted action" for Sherman Act purposes, just like (horizontal) concerted action between franchisees.[247]

Such cooperation was necessary to create and maintain the Topco venture, just like the NCAA's collective determination of how many players could take the field, how many games each team could schedule, and how much each school could compensate players.[248] Absent the joint venture, such collaboration would presumptively

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240. *See id.* at 598–99.

241. *Cf.* Rothery Storage & Van Co. v. Atlas Van Lines, Inc., 792 F.2d 210, 214–15 (D.C. Cir. 1986) (analogizing challenged restraints to those challenged in *Topco* and *NCAA* and concluding that all such restraints were concerted action between rivals).

242. *See* United States v. Topco Assocs., Inc., 319 F. Supp. 1031, 1032 (N.D. Ill. 1970) (listing twenty-nine different brands that the venture assigned to various products).

243. *Topco*, 405 U.S. at 602.

244. *Topco*, 319 F. Supp. at 1032 ("Topco's procurement operations are complex and extensive, involving the development of quality specifications and standards, product testing, innovation and quality control, label design and modernization, arrangements for label production and packaging, location of and negotiation with sources of supply, and product distribution.").

245. *Id.* at 1033 ("Members pay for merchandise procured at 'average cost' upon the same terms and discounts received from suppliers. The operating expenses of Topco are covered by annual service charges paid by the members and based on their gross sales.").

246. *Id.* at 1032 ("Topco . . . procures and distributes more than 1000 different food and related non-food items exclusively to its member chains, most of which are distributed under brand names owned by Topco.").

247. *See* Rothery Storage & Van Co. v. Atlas Van Lines, Inc., 792 F.2d 210, 214–15 (D.C. Cir. 1986); Meese, *supra* note 229, at 69 ("[F]ranchisees are actual or potential competitors both before and after they sign the franchise contract . . . . [F]ranchising contracts that control which products to offer, what price to charge, and where to locate are readily characterized as horizontal restraints."); *id.* at 69 n.313 (collecting additional authorities).

248. *See* NCAA v. Bd. of Regents of Univ. of Okla., 468 U.S. 85, 101–02 (1984) (describing these restraints).

violate Section 1 of the Sherman Act.[249] Like the various agreements between members of the NCAA, these forms of cooperation were presumptively reasonable efforts to maximize the venture's chance of success and thus improve interbrand competition. Thus, *NCAA*'s rationale for rejecting *per se* condemnation of price and output restraints applied with equal force to the *Topco* restraint, with the result that the Court's effort to distinguish *Topco* and similar decisions simply failed. Consistent application of the *NCAA* exemption would thus require rule of reason treatment for the restraints challenged in *Topco*, *Sealy*, and *Maricopa*, for instance.

C. NCAA *Sowed the Seeds of Its Own Destruction*

There is, however, a more fundamental shortcoming of the Court's effort to exempt the *NCAA* restraints from *per se* condemnation. In short, the rationale for the exemption undermines the broad *per se* rule against horizontal restraints the Court endorsed and thus suggests that the Court articulated and reaffirmed a regime that was to that extent overinclusive. The Court's novel exemption rested upon the critical assumption that the restraints *not* before the Court would themselves survive *per se* condemnation.[250]

The Court invoked three sources and associated lines of reasoning for this assertion. First, the Court invoked Robert Bork's assertion that certain activities and ventures, particularly sports leagues, can only be carried on jointly via cooperation between firms or other entities that are ostensible rivals.[251] In language not quoted by the Court, Bork elaborated by contending that the formation of a league should be exempt from antimerger strictures, presumably because no individual member could produce the league's product—athletic competition—unilaterally.[252] As a result, a "merger" between such members could not reduce actual or even potential competition.[253] He also contended that necessary restraints—the promulgation of rules of the game and the like—should be lawful *per*

249. *See* Nat'l Macaroni Mfrs. Ass'n v. Fed Trade Comm'n, 345 F.2d 421, 422–23 (7th Cir. 1965) (upholding FTC order invalidating concerted action to "fix or establish the kinds or proportions of ingredients to be used in producing macaroni and related products, or take any other concerted action, for the purpose of fixing or manipulating the price of such ingredients").

250. *See supra* note 172 and accompanying text.

251. *See NCAA*, 468 U.S. at 101–02 (citing BORK, *supra* note 163, at 278).

252. BORK, *supra* note 163, at 279; *cf.* Chi. Pro. Sports Ltd. v. Nat. Basketball Ass'n, 95 F.3d 593, 598–99 (7th Cir. 1996) ("[A] league with one team would be like one hand clapping[.]").

253. *Cf.* United States v. Citizens & S. Bank, 422 U.S. 86, 121–22 (1975) (finding that merger between firms that could not compete with one another because of state regulation did not "substantially lessen competition" within meaning of the Clayton Act).

se.[254] Second, the Court invoked *BMI* for the proposition that "a joint selling arrangement may be so efficient that it will increase sellers' aggregate output and thus be procompetitive."[255] Finally, the Court invoked *Sylvania* for the proposition that "a restraint in a limited aspect of a market may actually enhance marketwide competition."[256]

Taken together, invocation of these three sources implied that some restraints, like those setting rules of the game or requiring players to be enrolled students, were lawful *per se*, as Bork had suggested, because they were necessary to create and maintain the product—*college* football—and thus did not reduce competition that could otherwise exist.[257] Such logic could support recent holdings that certain NCAA Bylaws governing player eligibility are lawful *per se* under Section 1.[258]

Other restraints, including limits on salaries paid to student-athletes, were not obviously necessary to create the venture in the first place and thus *did* appear to reduce rivalry compared to a world without such restraints. Still, *Sylvania*'s account of redeeming virtues, based upon then-recent developments in economic theory, suggested that agreements regarding player compensation were properly analyzed under the rule of reason because they could overcome the market failure and reduction in economic welfare that would result from reliance on an unbridled market for players.[259] These restraints could thus increase consumer choice, the Court said, by facilitating the creation of a differentiated product in the marketplace and enhancing interbrand competition.[260]

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254. *See* BORK, *supra* note 163, at 279.

255. *See NCAA*, 468 U.S. at 103 (citing Broad. Music, Inc. v. Columbia Broad. Sys., Inc., 441 U.S. 1, 18–23 (1979)).

256. *Id.* (citing Cont'l T.V., Inc. v. GTE Sylvania Inc., 433 U.S. 36, 51–57 (1977)).

257. *See* BORK, *supra* note 163, at 278–79 (contending that initial formation of a lacrosse league should not be considered a merger between rivals); *id.* at 279 (contending that restraints that accompany a league that otherwise could not exist should be lawful *per se* if they help "make [the venture] efficient").

258. *See, e.g.*, Deppe v. NCAA, 893 F.3d 498, 501–02 (7th Cir. 2018) (quoting *NCAA* decision in holding that restraints "clearly meant to help maintain the 'revered tradition of amateurism in college sports' or the 'preservation of the student-athlete in higher education'" are lawful *per se*); Agnew v. NCAA, 683 F.3d 328, 342–43 (7th Cir. 2012) (same). *But see* NCAA v. Alston, 141 S. Ct. 2141, 2156–57 (2021) (rejecting the NCAA's argument that such restrictions are lawful *per se*); Meese, *supra* note 12, at 86–89 (contending that *Alston* should reject the NCAA's bid for *per se* legality).

259. *See supra* notes 155–156, 190, 203, 255–256 and accompanying text.

260. *See NCAA*, 468 U.S. at 102 ("Thus, the NCAA plays a vital role in enabling college football to preserve its character, and as a result enables a product to be marketed which might otherwise be unavailable. In performing this role, its actions widen consumer choice—not only the choices available to sports fans but those available to athletes—and hence can be viewed as procompetitive."); *see also* Meese, *supra* note 187, at 28–29 (concluding that

The Court's assertion that restraints limiting unbridled rivalry for players *should* avoid *per se* condemnation because they might produce redeeming virtues has certainly proved controversial. Some have even claimed that such restraints are indistinguishable from a naked cartel and that the amateurism that the NCAA seeks to preserve and promote is in fact a social welfare justification that is simply not cognizable as the sort of redeeming virtue that saves a class of restraint from *per se* condemnation.[261] However, this author at least finds the Court's evaluation of such restraints convincing as a matter of antitrust first principles.[262] "Cooperation is the basis of productivity," and horizontal cooperation is no exception.[263] Such cooperation is often necessary to eliminate market failures that unbridled rivalry would otherwise produce, with the result that horizontal restraints often produce redeeming virtues.[264] For instance, an agreement between schools that all players be actual enrolled students is horizontal and would ordinarily be unlawful *per se*, like any other agreement between rivals regarding which inputs to employ.[265] Still, the NCAA's ban on fielding nonstudents survives *per se* condemnation, presumably because allowing schools unbridled choice of players could result in a race to the bottom, teams full of nonstudent ringers, and deterioration of the NCAA's brand.[266] As various lower courts have also recognized—including the Ninth Circuit in *Alston*—closely analogous limits on compensation rivalry for the service of players can overcome such a market failure by preventing a race to the bottom that would otherwise occur if schools

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NCAA's rejection of *per se* condemnation depended upon a "recognition that some horizontal restrictions on rivalry can overcome market failures and thus enhance the results of overall competition").

261. *See, e.g.*, Roger D. Blair & Wenche Wang, *The NCAA Cartel and Antitrust Policy*, 52 REV. INDUS. ORG. 351, 352 (2017); Feldman, *supra* note 192, at 249–50 (contending that the NCAA's concept of amateurism is a social welfare justification and thus not cognizable under the Sherman Act). Indeed, in its argument before the *Alston* Court, plaintiffs' counsel referred to the NCAA's restrictions on payments exceeding the cost of attendance as "naked horizontal monopsony restraints" that "would be *per se* unlawful in any other context." *See* Transcript of Oral Argument at 42, NCAA v. Alston, 141 S. Ct. 2141 (2021) (No. 20-520).

262. *See* Meese, *supra* note 174, at 1791–93; Meese, *supra* note 229 at 70–72 (explaining how horizontal intrabrand restraints can overcome market failures and enhance the allocation of resources).

263. *See* Polk Bros. v. Forest City Enters., Inc., 776 F.2d 185, 188 (1985) ("Cooperation is the basis of productivity. It is necessary for people to cooperate in some respects before they may compete in others, and cooperation facilitates efficient production.").

264. *See* Meese, *supra* note 229, at 70–72; Meese, *supra* note 35, at 137–38. *See also* Newman, *supra* note 52, at 522–23 (explaining how many redeeming virtues constitute elimination of market failures).

265. *See* Meese, *supra* note 12, at 85–86.

266. *Id.*

were left with complete autonomy to bid for player services.[267] The *Sylvania* Court, of course, recognized that restraints on a "purely competitive situation" could nonetheless be reasonable because they enhanced interbrand competition.[268]

While convincing, such analysis was irrelevant under then-current law governing horizontal restraints. The *Topco* defendants, for instance, had argued forcefully that the challenged restraints were necessary to prevent venture members from free riding on each other's promotional efforts.[269] They also argued that such promotion would facilitate interbrand competition against large, integrated chains.[270] Thus, these (horizontal) restraints were every bit as necessary to further the Topco venture as were the (horizontal) restraints on schools' competitive bidding for players. However, the *Topco* Court had rejected defendants' contention that promoting interbrand competition was a redeeming virtue.[271] *Sylvania* and *Maricopa*, of course, had reaffirmed *Topco*.[272]

In short, *NCAA*'s rationale for rejecting *per se* condemnation of the restraints before it depended in part upon extension of *Sylvania*'s definition of redeeming virtues to the horizontal context, despite *Sylvania*'s (and *Maricopa*'s) protestation to the contrary. To be more precise, *NCAA* recognized that the propensity of a restraint to overcome free riding and thus enhance interbrand competition constituted a "redeeming virtue" within the *NPR* rubric, even if the challenged restraint was horizontal.[273] In so doing, the Court implicitly rejected any role for noneconomic considerations in the application of the *per se* test, just as *Sylvania* had done.[274] The Court

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267. *See* Alston v. NCAA, 958 F.3d 1239, 1257–59 (9th Cir. 2020); O'Bannon v. NCAA, 802 F.3d 1049, 1072–74 (9th Cir. 2015) (finding that limits on student-athlete compensation can enhance consumer demand by maintaining amateur nature of college athletics); Meese, *supra* note 174, at 1791–93.

268. *See* Cont'l T.V., Inc. v. GTE Sylvania Inc., 433 U.S. 36, 55 (1977).

269. *See supra* notes 99–107 and accompanying text.

270. Put another way, the Topco defendants argued (to quote *NCAA*) that "a restraint in a limited aspect of the market [intrabrand competition between Topco members]" would "enhance marketwide competition [between Topco members and national chains]." *See* NCAA v. Bd. of Regents of Univ. of Okla., 468 U.S. 85, 103 (1984) (citing *Sylvania*, 433 U.S. at 51–57). The chains, of course, were free unilaterally to create private label products and restrict the number of stores entitled to sell them.

271. *See supra* note 115–17 and accompanying text.

272. *See generally* Arizona v. Maricopa Cnty. Med. Soc'y, 457 U.S. 332 (1982); *Sylvania*, 433 U.S. at 57–58 nn.27–28.

273. *See NCAA*, 468 U.S. at 100–01.

274. *See also* Nat'l Soc'y of Pro. Eng'rs v. United States, 435 U.S. 679, 690 (1978) ("Under either branch of the test [*per se* analysis or rule of reason], the inquiry is confined to a consideration of the impact on competitive conditions."); *id.* at 690 n.16 ("Throughout the [*Standard Oil*] opinion, the emphasis is upon economic conceptions."); *id.* at 691 n.17 (discussing *Sylvania* and concluding that

also embraced then-recent developments in economic theory, concluding that nonstandard contracts are forms of voluntary integration that often overcome market failures and thus enhance economic welfare.[275]

This extension of *Sylvania*'s rationale to the horizontal context, in turn, undermined the logic of *Topco* and *Maricopa*, implicitly contracting the scope of the *per se* rule against horizontal restraints that both decisions had applied. Roughly speaking, the Court's rationale for exempting the challenged restraints from *per se* condemnation seemed to require restoration of the distinction between ancillary and naked restraints that a dissenting Chief Justice Burger and the *Topco* defendants had invoked.[276] The Court has never formally overruled this aspect of *Topco* and indeed subsequently cited the decision with approval.[277] Some have thus continued to treat *Topco* as good law.[278] Still, a couple of lower courts have read *NCAA* as overruling *Topco sub silentio*, perhaps contrary to the Court's own admonition that lower courts refrain from anticipating the Court's rejection of its own precedents.[279] In light of

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"'[c]ompetitive impact' and 'economic analysis' were emphasized throughout the opinion."); Meese, *supra* note 174, at 1789 ("*Professional Engineers* reiterated and solidified *Sylvania*'s rejection of the use of noneconomic values to give content to the Sherman Act.").

275. *See* Meese, *supra* note 174, at 1791–93; *see also, e.g.*, Alan J. Meese, *The Market Power Model of Contract Formation: How Outmoded Economic Theory Still Distorts Antitrust Doctrine*, 88 NOTRE DAME L. REV. 1291, 1293 (2013); Benjamin Klein, *Transaction Cost Determinants of "Unfair" Contractual Arrangements*, 70 AM. ECON. REV. 356, 356–62 (1980).

276. *See supra* notes 42–58, 113 and accompanying text.

277. *See* Palmer v. BRG of Ga., Inc., 498 U.S. 46, 49 (1990) (per curiam) (invoking *Topco* for the proposition that horizontal allocations of territories are unlawful *per se*, without reference to the ancillary restraints doctrine); *see also* Leonard Orland, *Teaching Antitrust after Chicago and Perestroika*, 66 N.Y.U. L. REV. 239, 249, 249 n.95 (1991) (treating *Palmer* as reaffirming *Topco* in its entirety).

278. *See, e.g.*, *In re* Blue Cross Blue Shield Antitrust Litig., 308 F. Supp. 3d 1241, 1260–63 (N.D. Ala. 2018) (concluding that both *Topco* and *Sealy* are still good law); John F. Ponsoldt, *Toward the Reaffirmation of the Antitrust Rule of Per Se Illegality as a Law of Rules for Horizontal Price Fixing and Territorial Allocation Agreements: A Reflection on the* Palmer *Case in a Renewed Era of Economic Regulation*, 62 SMU L. REV. 635, 643 (2009) (treating *Topco* as good law); LAWRENCE A. SULLIVAN & WARREN S. GRIMES, ANTITRUST: AN INTEGRATED HANDBOOK 227–30 (2000) (treating *Topco* as good law); *see also* LAWRENCE SULLIVAN ET AL., THE LAW OF ANTITRUST: AN INTEGRATED HANDBOOK 54 n.74 (2015) (citing *Topco* to explain that, "[i]n horizontal cases, the Court has routinely assumed that single brand restraints were subject to the same *per se* rule as multibrand horizontal restraints")

279. *Compare* Rothery Storage & Van Co. v. Atlas Van Lines, 792 F.2d, 210, 226–30 (D.C. Cir. 1986), *and* Polk Bros. v. Forest City Enters., 776 F.2d 185, 188–89 (7th Cir. 1985) (invoking *NCAA* in support of the ancillary restraints doctrine),

these pronouncements, the *Topco/Sealy/Maricopa* regime that *NCAA* purported to preserve was overinclusive by maintaining a *per se* rule against all horizontal restraints, a rule that lacked normative and economic justification.

A little reflection reveals that this aspect of *NCAA* weakens the case for the sports league exemption. After all, the exemption was a carve out from an otherwise overinclusive and outmoded *per se* rule against all horizontal restraints, including those that might produce redeeming virtues and thus qualify as "ancillary" under longstanding precedent. By reinstating the importance of possible redeeming virtues and rejecting noneconomic considerations, the *NCAA* Court implied that applications of the *per se* rule would reflect economic theory's assessment of whether a restraint might produce cognizable economic benefits.[280] Thus, the Court, and presumably lower courts bound by its pronouncements, would no longer apply the *NPR* standard in an overinclusive manner. Any "exemption," then, would be from a *per se* standard entirely receptive, as the Tenth Circuit was, to a defendant's assertions that a restraint might produce redeeming virtues. Proponents of such an exception would thus bear the burden of explaining why courts would be insufficiently receptive to defendants' assertions that a challenged restraint that satisfies the criteria for the sports league exemption might produce redeeming virtues. Nothing in *NCAA* begins to discharge this burden.

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In sum, *NCAA*'s application of antitrust's well-settled *per se* rule left much to be desired. As the Court itself noted, the NCAA's horizontal restrictions on price and output were "anticompetitive" and thus pernicious as *NPR* defined this term.[281] The Court's *per se* analysis identified no "redeeming virtues" that the restraint might produce.[282] A straightforward application of the *per se* standard would have required outright condemnation of the restraints without discussion of the appropriate treatment of restraints not before the Court.

At the same time, the Court ironically purported to retain and reaffirm *per se* condemnation of other horizontal restraints that had the potential at least to produce redeeming virtues, all the while seeming to articulate principles that, if applied across the board,

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with State Oil Co. v. Khan, 522 U.S. 3, 20 (1997) (praising the United States Court of Appeals for the Seventh Circuit for adhering to a dubious prior decision because "it is this Court's prerogative alone to overrule one of its precedents").

280. *See supra* note 36 and accompanying text (explaining that *Standard Oil* contemplated that courts would update antitrust doctrine in light of evolving understandings of the economic impact of trade restraints).

281. NCAA v. Board of Regents of Univ. of Okla., 468 U.S. 85, 106 (1984).

282. *Id.* at 113–20.

would undermine that condemnation.[283] As shown above, the Court's special immunity for restraints imposed by sports leagues—announced in an effort to preserve overinclusive applications of the *NPR* standard—contradicted basic antitrust principles and thus produced a regime that was underinclusive to the extent it prevented (and still prevents) plaintiffs from invoking the *per se* rule against such restraints, no matter how apparently harmful they may be. *Alston* provided the Court with an opportunity to repudiate the sports league exemption and ensure that general Section 1 principles, particularly the *NPR* standard, apply to such restraints. Unfortunately, the Court declined the opportunity.

IV. COMPOUNDING ERROR: *NCAA*'S ILL-CONSIDERED RULE OF REASON ANALYSIS

As explained above, *NCAA*'s sports league exemption requires plaintiffs challenging exempted restraints to invoke Section 1's fact-intensive rule of reason.[284] Plaintiffs can only prevail under this standard if they demonstrate that a restraint produces net harm.[285] Plaintiffs rarely satisfy this test. A study of reported cases from 1999 to 2009 found that plaintiffs failed to establish a prima facie case of harm in ninety-seven percent of such cases.[286] After learning that the *NCAA* Court had rejected *per se* condemnation of the restraints before it, most antitrust observers would have predicted that the challenged restraints would survive.

Often the Court delegates rule of reason analysis to lower courts, remanding the case after rejecting *per se* condemnation of a challenged restraint.[287] However, the Court in *NCAA* took a different approach, choosing to conduct such analysis itself, assisted by the

283. *Id.* at 100–04.

284. *See supra* Part III and accompanying text.

285. *See* Cont'l T.V., Inc., v. GTE Sylvania Inc., 433 U.S. 36, 49 (1977) (citing Chi. Bd. of Trade v. United States, 246 U.S. 231, 238 (1918)) ("Under this rule, the factfinder weighs all of the circumstances of a case in deciding whether a restrictive practice should be prohibited as imposing an unreasonable restraint on competition."); Standard Oil Co. v. United States, 221 U.S. 1, 56 (1911); Cap. Imaging Assocs. v. Mohawk Valley Med. Assocs., 996 F.2d 537, 543 (2d Cir. 1993).

286. Carrier, *supra* note 201, at 828; *see also* Michael A. Carrier, *The Real Rule of Reason: Bridging the Disconnect*, 1999 BYU L. REV. 1265, 1268 (finding that plaintiffs prevailed in sixteen percent of rule of reason cases).

287. *See* Leegin Creative Leather Prods. v. PSKS, Inc., 551 U.S. 877, 898–99, 908 (2006) (remanding for assessment under the rule of reason after rejecting plaintiff's bid for *per se* condemnation); Fed. Trade Comm'n v. Actavis, Inc., 570 U.S. 136, 160 (2013) ("We therefore leave to the lower courts the structuring of the present rule-of-reason antitrust litigation."); Bus. Elecs. Corp. v. Sharp Elecs. Corp., 485 U.S. 717, 717–18 (1988); Cal. Dental Ass'n v. Fed. Trade Comm'n, 526 U.S. 756, 781 (1999); *Sylvania*, 433 U.S at 59 (affirming Ninth Circuit judgment that had reversed a verdict condemning restraint as unlawful *per se* and remanding for a new trial).

district court's factual findings. Given the paucity of Supreme Court guidance on how to conduct such analysis, *NCAA*'s rule of reason methodology has loomed large in the lower courts, agencies, and with scholars, each of whom repeatedly invokes the decision for particular elements of rule of reason analysis.[288] Indeed, the Supreme Court itself has invoked *NCAA* to inform certain aspects of rule of reason analysis in subsequent decisions, including in *Alston*.[289] As shown below, this overreliance is unfortunate, as the Court's analysis was deeply flawed in some respects. Moreover, these flaws were natural results of the Court's refusal to apply the *NPR* standard and concomitant decision to assess a plainly anticompetitive restraint under the rule of reason. Subsequent decisions, including *Alston*, have compounded this error by generalizing *NCAA*'s approach to rule of reason analysis and applying that methodology to restraints that may produce redeeming virtues, including overcoming a market failure.

The Court began its analysis by repeating the obvious: namely, that the restraints before it "ha[d] a significant potential for

288. *See, e.g.*, Polygram Holding, Inc. v. Fed. Trade Comm'n, 416 F.3d 29, 36 (D.C. Cir. 2005) (invoking dicta in *NCAA* for proposition that a naked restraint on price or output itself establishes a prima facie case for purposes of rule of reason analysis); Law v. NCAA, 134 F.3d 1010, 1020 (10th Cir. 1998) (invoking *NCAA* for proposition that plaintiff can establish a prima facie case by demonstrating "that a horizontal agreement to fix prices exists, that the agreement is effective, and that the price set by such an agreement is more favorable to the defendant than otherwise would have resulted from the operation of market forces"); United States v. Brown Univ., 5 F.3d 658, 669 (3d Cir. 1993) (invoking *NCAA* in support of "abbreviated . . . rule of reason analysis"); *id.* at 673 (invoking *NCAA* for the proposition that certain restraints themselves establish a prima facie case of harm, despite the "absence of a detailed market analysis"); *id.* at 674 (invoking *NCAA* to require defendant to justify agreement that was "a price fixing mechanism impeding the ordinary functioning of the free market"); FED. TRADE COMM'N & DEP'T OF JUST., ANTITRUST GUIDELINES FOR COLLABORATIONS AMONG COMPETITORS 10 §3.3 (2000), https://www.ftc.gov/sites/default/files/documents/public_events/joint-venture-hearings-antitrust-guidelines-collaboration-among-competitors/ftcdojguidelines-2.pdf (citing *NCAA* for the proposition that a plaintiff can establish a prima facie case without establishing actual harm or market power if "the likelihood of anticompetitive harm is evident from the nature of the agreement"); Andrew I. Gavil, *Moving Beyond Caricature and Characterization: The Modern Rule of Reason in Practice*, 85 S. CAL. L. REV. 733, 753–56, 764 (2012).

289. *See Cal. Dental*, 526 U.S. at 769–70 (invoking *NCAA* for proposition that a "naked restraint on price and output requires some competitive justification even in the absence of a detailed market analysis"); Fed. Trade Comm'n v. Ind. Fed'n of Dentists, 476 U.S. 447, 460 (1986) (same); *see also* NCAA v. Alston, 141 S. Ct. 2141, 2157–58, 2159 (2021).

anticompetitive effects."[290] Under the ordinary rule of reason, however, mere potential does not suffice to establish a prima facie case.[291] Instead, the plaintiff must adduce evidence that the restraint produces tangible economic harm.[292] The *NCAA* Court concluded that the plaintiffs had satisfied this ordinary burden, invoking the district court's putative finding that the restraint resulted in lower output and higher prices than would have occurred without it.[293] This finding, it should be noted, was entirely speculative. The restraints had been in place in one form or another since the early 1950s when the NCAA punished the University of Pennsylvania for televising home games.[294] There was thus no control group; that is, no counterfactual against which to compare the prices and output that were obtained under the challenged plan.[295]

This finding, the Court said, immediately cast upon the defendants a burden of establishing some justification for the restraint.[296] Lower courts, the enforcement agencies, and scholars have read the decision to authorize dispensing with the market power inquiry, thereby allowing plaintiffs to establish a prima facie case merely by establishing "actual detrimental effects."[297] Courts,

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290. NCAA v. Board of Regents of Univ. of Okla., 468 U.S. 85, 104 (1984) ("Because it restrains price and output, the NCAA's television plan has a significant potential for anticompetitive effects.").

291. *Brown Univ.*, 5 F.3d at 673 (citing Tunis Bros. v. Ford Motor Co., 952 F.2d 715, 728 (3d Cir. 1991)).

292. *See* Realcomp II, Ltd. v. Fed. Trade Comm'n, 635 F.3d 815, 827 (6th Cir. 2011); Cap. Imaging Assocs. v. Mohawk Valley Med. Assocs., 996 F.2d 537, 543 (2d Cir. 1993); *see also Law*, 134 F.3d at 1020 (finding that plaintiffs establish a prima facie case by showing that the challenged restraint reduced salaries of so-called "restricted-earnings coaches" compared to prerestraint baseline).

293. *NCAA*, 468 U.S. at 104–08; *see also* PHILLIP E. AREEDA, ANTITRUST LAW: AN ANALYSIS OF ANTITRUST PRINCIPLES AND THEIR APPLICATION 430–33 (1986) (reading *NCAA* as resting upon finding that restraint produced actual competitive harm and not mere existence of the restraint).

294. *See NCAA*, 468 U.S. at 89–91 (describing the history of the NCAA's adoption of limits on televising games).

295. *See* Meese, *supra* note 63, at 477–78, 478 n.105 (describing district court's methodology in *NCAA* as a "thought experiment" and hypothetical assessment of the impact of removal of the challenged restraints).

296. *See NCAA*, 468 U.S. at 113 (invoking both nature of the restraint and the "findings of the District Court . . . that it has operated to raise prices and reduce output" to require shifting burden to the defendants).

297. *See, e.g.*, Fed. Trade Comm'n v. Ind. Fed'n of Dentists, 476 U.S. 447, 460 (1986) (citing *NCAA* to support holding that proof of actual detrimental effects sufficed to make out a prima facie case); *Law*, 134 F.3d at 1020 (invoking *NCAA* for proposition that plaintiff could establish a prima facie case by establishing that restraint altered salaries of certain "restricted-earnings coaches" compared to the *status quo ante*); Cap. Imaging Assocs. v. Mohawk Valley Med. Assocs., 996 F.2d 537, 546 (2d Cir. 1993) (citing *NCAA* for the proposition that plaintiffs need not demonstrate market power to establish a prima facie case and may establish

including the Ninth Circuit in *Alston*, have invoked this logic when assessing restraints on compensation that schools pay students and coaches.[298] The Supreme Court affirmed and approved the Ninth Circuit's reliance on "actual detrimental effects," albeit combined with the NCAA's stipulation that it possessed power in a relevant market.[299]

At first glance, reliance upon actual detrimental effects to establish a prima facie case makes perfect sense. Section 1's rule of reason, as explained in *Standard Oil*, mandates an assessment of whether a challenged restraint produces monopoly or the results of monopoly, namely higher prices, reduced output, and/or reduced quality.[300] Moreover, the proper baseline for such an assessment would seem to be the *status quo ante* the restraint. Thus, it would seem, proof that a restraint increases prices or reduces output compared to that baseline should establish a prima facie case of harm, thereby shifting the burden of producing evidence of benefits to defendants.[301]

But first glances are sometimes mistaken. *NCAA* and its progeny (judicial, agency, and academic) made such a mistake when they concluded that actual detrimental effects would establish a prima facie case in *all* rule of reason cases. For, as explained elsewhere, the relevance of such proof depends critically upon the nature of the restraint before the court and, more precisely, why the restraint survived *per se* condemnation under the *NPR* standard or ancillary

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such a case by proving actual detrimental effects); *see also* United States v. VISA U.S.A., Inc., 344 F.3d 229, 238 n.4 (2d Cir. 2003) (citing *NCAA* for the proposition that proof of market power may not be necessary to establish a prima facie case); FED. TRADE COMM'M & DEP'T OF JUST., *supra* note 288, at 10–11 §3.3, https://www.ftc.gov/sites/default/files/documents/public_events/joint-venture-hearings-antitrust-guidelines-collaboration-among-competitors/ftcdojguidelines-2.pdf (citing *Ind. Fed'n of Dentists*, 476 U.S. at 460–61 for the proposition that proof that "anticompetitive harm has resulted from an agreement already in operation" suffices to make out a prima facie case); Andrew I. Gavil & Steven C. Salop, *Probability, Presumptions and Evidentiary Burdens in Antitrust Analysis*: *Revitalizing the Rule of Reason for Exclusionary Conduct*, 168 UNIV. PA. L. REV. 2107, 2116 (2020) (endorsing this approach).

298. *See* Alston v. NCAA, 958 F.3d 1239, 1256–57 (9th Cir. 2020) (citing Alston v. NCAA, 375 F. Supp. 3d 1058, 1070 (N.D. Cal. 2019)); *Alston*, 375 F. Supp. 3d at 1070 ("The challenged rules thus have severe anticompetitive effects and student-athlete are harmed as a result of the challenged rules, because the rules deprive them of compensation that they would otherwise receive for their athletic services."); O'Bannon v. NCAA, 802 F.3d 1049, 1070–71 (9th Cir. 2015) (resting prima facie case on proof of "an anticompetitive effect"); *Law*, 134 F.3d at 1020 (finding that plaintiff established prima facie case against NCAA's restricted earnings rule by showing that salaries of affected coaches fell shortly after implementation of the rule).

299. *See Alston*, 141 S. Ct. at 2154.

300. *See supra* notes 34–35 and accompanying text.

301. *See* Gavil, *supra* note 288, at 754 (attributing such reasoning to *NCAA*).

restraints test.[302] To be even more precise, the usefulness or not of such proof depends upon the type of redeeming virtue the court invokes when it determines that a particular type of restraint should survive *per se* condemnation.

If the possible virtues would take the form of technological efficiencies, it makes perfect sense to treat prerestraint prices as a baseline against which to evaluate postrestraint prices.[303] After all, technological efficiencies should manifest themselves as reduced production costs and thus higher output and lower prices, other things being equal. Proof that such a restraint produces prices higher than the prerestraint level is thus consistent with two distinct and competing hypotheses: first, that the restraint generates market power and no efficiencies, or second, that the restraint generates both market power and efficiencies, but that the efficiencies are too small to counteract the price impacts of the exercise of market power.[304] In either case, it makes sense to shift the burden of production to the defendant.[305]

However, as *Sylvania* taught us, some efficiencies are not technological. Instead, challenged restraints may also avoid *per se* condemnation if they may improve the operation of a market by

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302. *See* Meese, *supra* note 35, at 145–61.

303. *See id.* at 166–67.

304. *See* Alan A. Fisher et al., *Afterword: Could a Merger Lead to Both a Monopoly and a Lower Price*, 71 CALIF. L. REV. 1697, 1702 (1983) ("A merger would have to produce extraordinarily large cost savings to permit the same or lower prices from monopoly than from a premerger competitive situation.").

305. Readers may wonder whether this conclusion turns on the welfare standard employed when assessing whether a restraint is reasonable. *See* Roger D. Blair & D. Daniel Sokol, *The Rule of Reason and the Goals of Antitrust: An Economic Approach*, 78 ANTITRUST L.J. 471, 480 (2012) (concluding that the Supreme Court has not clarified whether Section 1 analysis focuses on total welfare or purchaser welfare). It does not. Under a purchaser welfare standard, higher prices constitute an unambiguous harm. *See id.* (citing Leegin Creative Leather Prods., Inc. v. PSKS, Inc., 551 U.S. 877, 909 (2001)). Under a total welfare approach, enhanced prices do not themselves constitute harm but instead indicate that the restraint has resulted in an allocation of resources inferior to that which obtained before the restraint. In either case, then, proof of higher prices indicates that the restraint has produced antitrust harm. At the same time, the nature of subsequent balancing *will* depend upon the choice of welfare standards. Under a total welfare standard, courts would compare the extent of the allocative loss to the magnitude of efficiencies the restraint produces. Under a purchaser welfare standard, the court would ask whether the benefits of the restraint offset the harm by preventing price increases above the prerestraint baseline. *See* Alan J. Meese, *Debunking the Purchaser Welfare Account of Section 2 of the Sherman Act: How Harvard Brought Us a Total Welfare Standard and Why We Should Keep it*, 85 N.Y.U. L. REV. 659, 668–70 (2010) (describing nature of balancing under total welfare and purchaser welfare standards).

overcoming a market failure.[306] The classic example would be the propensity of minimum resale price maintenance or a nonprice vertical restraint to overcome failure in the distribution market by combatting free riding and increasing the output of advertising and promotion.[307] If successful, such a restraint and the resulting promotion would enhance demand and thus the price for the relevant product.[308]

In these circumstances, the restraint has survived *per se* condemnation precisely because the prerestraint baseline price is not necessarily the result of a well-functioning market. Proof that the restraint resulted in prices higher than the prerestraint baseline is equally consistent with two competing hypotheses: first, that the restraint has created and exercised market power, or second, that the restraint has enhanced interbrand competition and thus produced procompetitive benefits.[309] Evidence that is equally consistent with two such competing hypotheses cannot, without more, establish a prima facie case under traditional antitrust procedure.[310] In these circumstances, cases should only proceed if the plaintiff can establish that the defendants possess market power of the sort necessary to produce economic harm.[311]

The Court's erroneous conclusion to the contrary is quite understandable. After all, the Court's rejection of the *NPR* standard in favor of the sports league exemption precluded consideration of alternate explanations for the postrestraint price increase that the district court identified.[312] The Court exempted the challenged restraints from *per se* condemnation without identifying a redeeming

306. *See* Meese, *supra* note 35, at 141–44; Newman, *supra* note 52, at 536–37 n.272.

307. *See* Robert H. Bork, *Resale Price Maintenance and Consumer Welfare*, 77 YALE L.J. 950, 955–56 (1968) (treating promotional information as "just as much an output of the economy as any other product (or service)").

308. *See* Meese, *supra* note 63, at 507–08 (explaining how restraints such as those condemned in *Topco* could encourage promotion and thus enhance demand for the venture's product).

309. Meese, *supra* note 35, at 148–52.

310. *See, e.g.*, Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 587–88 (1986) (noting that evidence that is as consistent with procompetitive as with anticompetitive objectives cannot, without more, support an inference of anticompetitive conduct); Monsanto Co. v. Spray-Rite Serv. Corp., 465 U.S. 752, 762–64 (1984) (same); First Nat'l Bank of Ariz. v. Cities Serv. Co., 391 U.S. 253, 279–80 (1968) (same); *see also* Eastman Kodak Co. v. Image Tech. Servs., Inc., 504 U.S. 451, 466–67 (1992) ("Legal presumptions that rest on formal distinctions rather than actual economic realities are generally disfavored in antitrust law.").

311. *See* Meese, *supra* note 35, at 148.

312. *See supra* notes 156–61, 191–98 and accompanying text.

virtue that the restraints might create.[313] Nor were there any apparent potential benefits of the restraints.[314]

The Court thus had no reason to consider the possibility that presence of a redeeming virtue might result in higher prices, thereby undermining the argument for resting a prima facie case on the presence of "actual detrimental effects." Instead, the Court naturally defaulted to the foundational price-theoretic framework that interprets increased prices as reflecting an exercise of market power.[315] In other contexts, by contrast, the Court has recognized that price increases do not necessarily indicate the exercise of such power but instead may reflect the beneficial consequences of a restraint.[316]

The restraints before the Court were simply not representative of the sort of restraints that ordinarily merit rule of reason treatment, i.e., that avoid *per se* condemnation because they may produce redeeming virtues. However, *NCAA* did not qualify or limit the application of its rule of reason methodology. Lower courts and the enforcement agencies have unfortunately extrapolated from *NCAA*'s reliance upon actual detrimental effects in an unrepresentative case, treating proof of such effects as a generalized method of establishing a prima facie case.[317]

Courts and agencies have exacerbated this error by assuming that any benefits that such restraints produce coexist with harms, creating an irrebuttable presumption once a plaintiff establishes a prima facie case in this manner, thereby requiring tribunals to balance benefits against putative harms.[318] Similar erroneous logic informs judicial and administrative condemnation of restraints that produce significant benefits merely because there is a less restrictive

313. *See supra* note 170–71 and accompanying text.

314. *See supra* notes 159–61 and accompanying text.

315. *See* Meese, *supra* note 63, at 512–19 (contending that price theory's partial equilibrium framework results in misleading assessment of restraints that avoid *per se* condemnation because they may produce nontechnological efficiencies by overcoming a market failure).

316. Leegin Creative Leather Prods., Inc. v. PSKS, Inc., 571 U.S. 877, 895–97 (2007); Bus. Elecs. Corp., v. Sharp Elecs. Corp., 485 U.S. 717, 728, 731 (1988); *see also* Monsanto Co. v. Spray-Rite Serv. Corp., 465 U.S. 752, 762–64 (1984).

317. *See* Neal Devins & Alan Meese, *Judicial Review and Nongeneralizable Cases*, 32 FLA. ST. L. REV. 323, 338, 351 (2005) (contending that precedents adopted in cases with idiosyncratic facts may not reflect appropriate consideration of various factors that should inform the resulting rule); *supra* note 297 (collecting authorities invoking *NCAA* in support of actual detrimental effects standard).

318. *See* Meese, *supra* note 35, at 164–65 (critiquing this aspect of the rule of reason as implemented in the lower courts and contending that evidence that a restraint overcomes a market failure should undermine any presumption that putative actual detrimental effects reflect exercise of market power).

means of achieving such benefits.[319] Here again, this test rests upon the assumption that the benefits produced by the restraint coexist with harms, an indefensible assumption after the defendant has adduced significant evidence that the restraint produces benefits by overcoming a market failure.[320] The Court in *Alston* itself committed this error by endorsing application of the less restrictive alternative test (for the first time) in a case where the Court did not question the lower courts' findings that the NCAA's limits on compensation enhanced the quality of the product—intercollegiate athletic competition—produced and sold by the joint venture.[321] This finding was consistent with and confirmed the defendants' contention that the challenged restraints overcame the market failure that would have occurred if member institutions remained free to determine what compensation they would provide to student-athletes.[322] Such proof undermined any argument that the restraint's impact on player compensation was necessarily the result of an exercise of market power. On the contrary, such proof merely confirmed that the restraint produced redeeming virtues, the prospect of which should prevent *per se* condemnation under both the *NPR* standard and the ancillary restraints test. Absent some other indicium of antitrust harm, there is simply no reason to assume that the challenged restraint is "restrictive" and thus no reason to search for a *less* restrictive alternative.[323]

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319. *See, e.g.*, Alston v. NCAA, 958 F.3d 1239, 1264 (9th Cir. 2020) (stating that the lower court opinion noted that provisions preventing schools from paying outright salaries to players were "anticompetitive" and yet also enhanced the quality of the venture product); *id.* at 1260–62 (subjecting such restraints to a less restrictive alternative test on assumption that benefits coexisted with harms); FED. TRADE COMM'N & U.S. DEPT. OF JUST., *supra* note 288, at 24 §3.36(b).

320 *See* Meese, *supra* note 63, at 480 (describing this assumption of the less restrictive alternative test); *id.* ("Absent this assumption, there is simply no reason to assume that the restraint is 'restrictive,' or to ask whether there is a less restrictive means of achieving the same benefits."); Meese, *supra* note 35, at 82 ("Consideration of such alternatives depends upon an assumption that procompetitive benefits necessarily coexist with anticompetitive effects once a plaintiff has established a prima facie case."); *id.* at 169 n.501 (explaining that application of the less restrictive alternative test depends upon an assumption that the restraint's benefits coexist with harms); *id.* at 170 (contending that proof that a less restrictive alternative will achieve same or similar benefits as challenged restraint should not give rise to rule of reason liability if restraint overcomes a market failure).

321. *Alston*, 958 F.3d at 1257; *see also* Thomas Nachbar, *Ancillary Restraints and the Less Restrictive Alternative Test,* 45 SEATTLE UNIV. L. REV. (forthcoming 2022) (explaining how the Supreme Court had repeatedly declined to adopt the less restrictive alternative test).

322. *Id.*

323. To be sure, the plaintiffs also established, based on the defendants' concession, that the NCAA possessed power in a relevant market. However, firms with market power often enter voluntary and efficient contracts with

Endorsement of the actual detrimental effects test was not the Court's only rule of reason misstep. After indicating that such effects sufficed to establish a prima facie case, the Court addressed the defendants' argument that plaintiffs must in all cases prove market power to establish a prima facie case under the rule of reason.[324] The Court rejected this argument, at least as applied to restraints such as those before the Court.[325] "[A]s a matter of law," the Court said, "the absence of proof of market power does not justify a *naked restriction on price or output*."[326] While the Court did not define the term "naked," it presumably meant to refer to those restraints that set price and/or output without any possibility of simultaneously producing redeeming virtues.[327] While probably dicta, scholars, courts, and the enforcement agencies subsequently read this single sentence as establishing an entirely new brand of rule of reason analysis—the so-called "Quick Look."[328] Under this approach, the plaintiff may establish a prima facie case simply by convincing the tribunal that a restraint is "inherently suspect" and thus poses a threat of competitive harm sufficient to establish a prima facie case.[329]

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counterparties, without exercising such power to obtain such agreement. *See* Meese, *supra* note 275, at 1345–57 (describing process of voluntary formation of non-standard contracts); *id.* at 1353–55 (explaining how firms with market power may employ an identical process of voluntary contract formation).

324. *See* NCAA v. Board of Regents of Univ. of Okla., 468 U.S. 85, 109–10 (1984).

325. *Id.* at 109–13.

326. *Id.* at 109 (emphasis added).

327. *See, e.g.*, White Motor Co. v. United States, 372 U.S. 253, 263 (1963) ("Horizontal territorial limitations, like 'group boycotts, or concerted refusals by traders to deal with other traders' are naked restraints of trade *with no purpose except stifling of competition*." (emphasis added) (quoting Klor's Inc v. Broadway-Hale Stores, Inc., 359 U.S. 207, 212 (1959)). There is one alternative, however. That is, the term "naked" could be a synonym for "express" or "explicit." Under this approach, a "naked" restraint could avoid *per se* condemnation because it might produce redeeming virtues by, for instance, overcoming a market failure. *See, e.g.*, Rothery Storage & Van Co. v. Atlas Van Lines, Inc., 792 F.2d 210, 229 (D.C. Cir. 1986) (declining to condemn explicit horizontal price restraint that was ancillary to legitimate joint venture).

328. *See, e.g.*, Cal. Dental Ass'n v. Fed. Trade Comm'n, 526 U.S. 756, 769–70 (1999) (detailing purported creation of the "Quick-Look" analysis in previous cases).

329. *See, e.g.*, Polygram Holding Inc. v. Fed. Trade Comm'n, 416 F.3d 29, 35–36 (D.C. Cir. 2005); United States v. Brown Univ., 5 F.3d 658, 669 (3d Cir. 1993) (invoking *NCAA* in support of "abbreviated rule of reason analysis"); *id.* at 673 (invoking *NCAA* for the proposition that certain restraints themselves establish a prima facie case of harm, despite the "absence of a detailed market analysis"); *id.* at 674 (invoking *NCAA* to require defendant to justify agreement that was "a price fixing mechanism impeding the ordinary functioning of the free market").

The rejection of a market power filter for truly naked restraints made perfect sense as a matter of antitrust principles. After all, both before and after *NCAA*, a restraint that set price and output without any possibility of producing redeeming virtues was unlawful *per se*, without regard to the market position of the parties or any proof that the restraint produced harm.[330] Such summary condemnation, of course, necessarily obviated the need for rule of reason analysis of any sort, let alone analysis of market power.

Of course, *NCAA* did not summarily condemn the restraints before it but instead assessed them under the rule of reason.[331] But assuming that the restraints were truly naked, requiring plaintiffs to prove market power to establish a prima facie case against restraints the Court should have condemned outright would have wasted resources and deterred some plaintiffs from challenging such agreements in the first place. Such a requirement would have effectively immunized some unambiguously harmful restraints from challenge, thereby increasing the number of false negatives without any apparent countervailing benefit.[332]

Thus, the Court's rejection of the market power filter presumably did no harm in *NCAA* itself. Nor would it do any harm in other cases where courts improperly exempt restraints that cannot produce redeeming virtues from *per se* condemnation.[333] However, this rejection and its rationale did not remain confined to *NCAA* or other cases where possible redeeming virtues were absent. Instead, lower courts, enforcement agencies, and scholars have read the decision to authorize dispensing with the market power inquiry in any number of rule of reason cases.[334]

Indeed, and perhaps more tellingly, these courts have also read *NCAA* as holding that the mere existence of certain restraints suffices to establish a prima facie case, thereby dispensing with the need to offer *any* evidence of antitrust harm—whether market power or actual detrimental effects—to establish a prima facie case.[335] Moreover, no judicial or agency articulation of this approach limits its application to cases where defendants have somehow avoided *per se*

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330. Fed. Trade Comm'n v. Super. Ct. Trial Laws., 493 U.S. 411, 424 (1990) (rejecting reasonable price defense for price-fixing agreement between public defenders); Catalano, Inc. v. Target Sales, Inc., 446 U.S. 643, 647 (1980) (per curiam).

331. *See NCAA*, 468 U.S. at 119.

332. *See supra* note 202 and accompanying text (explaining how *NCAA*'s sports league exemption predictably generates false negatives).

333. *See, e.g.*, *Polygram*, 416 F.3d at 33–39 (subjecting challenged restraint to "Quick Look" analysis without identifying rationale for declining to condemn restraint as unlawful *per se*).

334. *See supra* note 297 and accompanying text (collecting cases addressing this topic).

335. Meese, *supra* note 35, at 99–100.

condemnation without identifying any possible redeeming virtue. Thus, the Supreme Court, lower courts, enforcement agencies, and scholars have all recognized the possibility that restraints that survive *per se* condemnation because they may produce redeeming virtues may nonetheless pose such a risk of net anticompetitive harm that they are "inherently suspect" and thus suffice to establish a prima facie case.[336] Indeed, under current law, consideration of whether a restraint is inherently suspect is very often the first step of what was once ordinary rule of reason analysis.[337]

At the same time, the answer to this question is almost always "no," at least in the judicial arena. That is, courts almost always

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336. *See, e.g.*, Fed. Trade Comm'n v. Actavis, Inc., 570 U.S. 136, 159–60 (2013) (considering but rejecting application of "Quick Look" doctrine to restraint that survived *per se* condemnation because it might produce benefits); FED. TRADE COMM'N & DEP'T OF JUST., *supra* note 288, at 8–9 §3.2 (articulating standards governing whether restraint is ancillary to otherwise valid venture and thus avoids *per se* condemnation); *id.* at 10–11 §3.3 (asserting that the agencies will condemn an agreement "without a detailed market analysis" "where the likelihood of anticompetitive harm is evident from the nature of the agreement . . . absent overriding benefits that could offset the anticompetitive harm").

337. *See, e.g.*, Texaco, Inc. v. Dagher, 547 U.S. 1, 7 n.3 (2006) (rejecting plaintiff's argument that restraint was properly subject to a "Quick Look" analysis); Cal. Dental Ass'n v. Fed. Trade Comm'n, 526 U.S. 756, 769–81 (1999) (rejecting contention that challenged restraint was inherently suspect and therefore subject to "Quick Look" analysis); Harris v. Safeway, Inc., 651 F.3d 1118, 1137–39 (9th Cir. 2011) (en banc) (rejecting plaintiff's argument that restraint was properly subject to "Quick Look"); Deutscher Tennis Bund v. ATP Tour, Inc., 610 F.3d 820, 829–32 (3d Cir. 2010) (affirming district court's refusal to instruct the jury on plaintiff's "Quick Look" theory); Major League Baseball Props. v. Salvino, Inc., 542 F.3d 290, 317–34 (2d Cir. 2008) (rejecting plaintiff's contention that challenged restraints were properly subject to "Quick Look"); Gordon v. Lewistown Hosp., 423 F.3d 184, 209–10 (3d Cir. 2005) (declining to subject exclusive dealing arrangement to "Quick Look"); Worldwide Basketball & Sports Tours v. NCAA, 388 F.3d 955, 959–62 (6th Cir. 2004) (rejecting plaintiff's claim that challenged restraint was subject to "Quick Look" analysis); Cont'l Air Lines, Inc. v. United Air Lines, Inc., 277 F.3d 499, 509–14 (4th Cir. 2002) (rejecting lower court's determination that challenged restraint was subject to "Quick Look"); Chi. Pro. Sports, Ltd. v. Nat'l Basketball Ass'n, 95 F.3d 593, 601 (7th Cir. 1996) (rejecting preliminary determination that "Quick Look" applied and instead holding that proof of market power was necessary to establish a prima facie case); Orson, Inc. v. Miramax Film Corp., 79 F.3d 1358, 1367 n.9 (3d Cir. 1996) (declining to subject exclusive dealing arrangement to "Quick Look" analysis); U.S. Healthcare, Inc. v. Healthsource, Inc., 986 F.2d 589, 594 (1st Cir. 1993) (declining to utilize "Quick Look" analysis); Metro. Intercollegiate Basketball Ass'n v. NCAA, 337 F. Supp. 2d 563, 573 (S.D.N.Y. 2004) (rejecting plaintiff's contention that sports league restraint should be subject to a "Quick Look"); Holmes Prods. Corp. v. Dana Lighting, Inc., 958 F. Supp. 27, 33 (D. Mass. 1997) (declining to subject exclusive distribution agreement to "Quick Look" analysis).

reject a plaintiff's contentions that a restraint that has avoided *per se* condemnation because it may produce redeeming virtues is nonetheless inherently suspect.[338] The only exceptions seem to be for those rare cases in which courts exempt a restraint from *per se* condemnation without identifying any potential redeeming virtues, as occurred in *NCAA* itself.[339] As a result, investments by plaintiffs, defendants, and courts in determining whether a restraint is inherently suspect are a waste of society's resources, insofar as this inquiry always leads to the result that would have occurred even absent such an inquiry—ordinary rule of reason analysis.[340] To the extent *NCAA* gave rise to the "Quick Look," the decision is responsible for this waste.

Despite these repeated judicial rebuffs, scholars in particular have continued their efforts to identify a category of restraints that avoid *per se* condemnation but nonetheless pose such anticompetitive harm that they are "inherently suspect." These efforts generally begin with a citation of *NCAA* as the beginning of the so-called "Quick Look,"[341] a citation that thereby confers a modicum of legitimacy on the category and encourages the devotion of scholarly and judicial energy to the development of some defensible definition of "inherently suspect."[342] At the same time, neither scholars nor jurists have generated a tractable standard for distinguishing "inherently suspect" restraints from those that should receive ordinary rule of reason treatment.[343] This should be no surprise. Restraints generally avoid *per se* condemnation because they accompany some admittedly legitimate venture or transaction and, in addition, may further the legitimate, efficiency-enhancing objects of the venture. Moreover, many such agreements are horizontal and may even entail horizontal allocations of territories or price setting.[344] Treating all such agreements as "inherently suspect," and thus sufficient to establish a

338. *See, e.g.*, Meese, *supra* note 2, at 871 (explaining that "defendants almost always prevail at step one" of the "Quick Look" analysis).

339. *See, e.g.*, Polygram Holding, Inc. v. Fed. Trade Comm'n, 416 F.3d 29, 37 (2005); United States v. Brown Univ., 5 F.3d 658 (3d Cir. 1993) (declining to condemn challenged horizontal price fixing without identifying a possible redeeming virtue that the restraint might produce).

340. *See* Meese, *supra* note 2, at 871.

341. *See* Gavil, *supra* note 288, at 755–56 (stating that *NCAA* endorsed the "truncated" rule of reason).

342. *See, e.g.*, Gavil & Salop, *supra* note 297, at 2121 (endorsing "truncated" rule of reason whereby the presence of an inherently suspect restraint suffices to establish a prima facie case).

343. *See* Meese, *supra* note 2, at 877–80 (explaining that scholars and courts have failed to identify a tractable standard for identifying which restraints are inherently suspect).

344. *See also* Polk Bros. v. Forest City Enters., Inc., 776 F.2d 185, 189 (7th Cir. 1985) (explaining that restraints deemed ancillary are just as horizontal as horizontal restraints deemed unlawful *per se*).

prima facie case, would unnecessarily increase the cost of rule of reason litigation, predictably generate numerous false positives, and thus condemn various wealth-creating restraints.[345]

Here again one can trace the Court's erroneous suggestion to its departure from the traditional two-part framework for determining whether a category of restraint is unlawful *per se*. Adherence to this framework would have required the Court first to determine whether the restraints before it may produce redeeming virtues. A negative answer would have required the Court to condemn summarily the restraints before it, thereby obviating the need for any discussion of how to conduct rule of reason analysis. By adopting such an approach, the Court would have avoided the need to opine on the methodology of rule of reason analysis while still assessing a restraint that by its nature was anticompetitive on its face and could produce no redeeming virtues. Unfortunately, the Court instead took an approach that led it to opine about the standards for establishing a *prima face* case based upon a restraint and record that was not representative of those restraints that properly survive *per se* condemnation.[346] The result has been more than three decades of doctrinal evolution and scholarly dialogue premised upon an idiosyncratic and misleading application of the rule of reason.

CONCLUSIONS AND IMPLICATIONS

Alston provided the Court with an opportunity to correct *NCAA*'s own errors as well as some of those the decision inspired. The Court could have discarded the sports league exemption and reinstated the *NPR* standard and ancillary restraints test as the proper methodology for assessing whether such restraints merit rule of reason treatment. The Court could have further clarified that *Sylvania*'s approach to defining redeeming virtues applies in the horizontal context, thereby confirming that *Topco* and similar decisions are no longer good law.[347] The result would have been a *per se* rule that is neither underinclusive nor overinclusive but instead empowers courts to condemn those restraints—and only those restraints—that reduce rivalry without any prospect of producing efficiencies.

345. *See* Gavil & Salop, *supra* note 297, at 2139 (opining that the mere fact that a restraint is horizontal "does not automatically justify an anticompetitive presumption"); Meese, *supra* note 2, at 878–79 (same).

346. *See* Devins & Meese, *supra* note 317, at 336, 351 (contending that judicial decisions based on nongeneralizable facts generate distorted doctrine).

347. To its credit, the Court unanimously confirmed that the Sherman Act bans only those restraints that reduce consumer welfare, thereby undermining to that extent *Topco*'s holding that the autonomy of traders from contracts they voluntarily entered supersedes interbrand competition and thus consumer welfare. *See* NCAA v. Alston, 141 S. Ct. 2141, 2151–52 (2021).

None of the parties asked the Court to rethink *NCAA*'s sports league exemption or the erroneous approaches to rule of reason analysis that it inspired.[348] At the same time, there was Sherman Act precedent for speaking more broadly than absolutely necessary to resolve a particular case. *Sylvania* itself exemplified such an approach.[349] There the Ninth Circuit had reversed the district court's determination that a location clause was unlawful *per se*, distinguishing the practice from the exclusive territory the Court had summarily condemned in *Schwinn*.[350] The defendants contended that the Court could affirm the Ninth Circuit's decision without overruling *Schwinn*, a result that Justice White advocated in his concurrence.[351] The Court nonetheless reconsidered and overruled *Schwinn*, affirming the Ninth Circuit on grounds that were broader than necessary.[352]

In the same way, the *Alston* Court could have reconsidered and rejected the sports league exemption, even if both parties were content to take the exemption as given. The Court would next have had to determine whether the restraints might produce redeeming virtues or, in the alternative, whether such restraints were "ancillary" to what all conceded was a valid joint venture. The Court could have decided, contrary to the view of this author, that purported benefits of the restraints before it did not constitute redeeming virtues under the *NPR* standard.[353] The Court could have also embraced one or more virtues but rejected others.[354] Whichever course the Court decided to take would have provided important guidance to lower courts about how to discern whether a purported virtue is "redeeming" and thus whether a particular restraint is unlawful *per se*.

In the alternative, the Court could have ordered reargument and directed the parties to address the validity of the exemption that the *NCAA* Court announced without briefing on the matter.[355] Such an order could have also directed the parties to address, again for the

348. *See* Jin-Taek Hong & Daniel T. McCarthy, *National Collegiate Athletic Association v. Alston*, CORNELL L. SCH. SUP. CT. BULL., https://www.law.cornell.edu/supct/cert/20-512 (last visited Oct. 26, 2021) (discussing "[q]uestions as [f]ramed for the Court by the [p]arties").

349. Cont'l T.V., Inc. v. GTE Sylvania Inc., 433 U.S. 36, 57–59 (1977).

350. *Id.* at 41–42 (describing the Ninth Circuit's narrow rationale for rejecting *per se* the condemnation location clause before it).

351. *Id.* at 59–66 (White, J., concurring).

352. *Id.* at 57–59.

353. *Cf.* Polygram Holding, Inc. v. Fed. Trade Comm'n, 416 F.3d 29, 37–38 (D.C. Cir. 2005) (concluding that restraints that apparently combatted free riding could not produce cognizable antitrust benefits).

354. For instance, the Court could have held that preserving the amateur nature of college football was a redeeming virtue, while preserving competitive balance was not.

355. *See* Meese, *supra* note 12, at 84.

first time in the Supreme Court, whether the NCAA's horizontal restraints imposed on student-athlete compensation may produce redeeming virtues and, if so, the nature of such potential virtues. Unfortunately, the *Alston* Court took neither course, leaving for another day, or perhaps never, a definitive and well-informed resolution by the Court of one or both issues.

De novo treatment of the question would have placed the resulting answer on a more solid footing, better integrating this conclusion within the Court's larger post-*Sylvania* framework for determining whether purported virtues are redeeming.[356] In particular, the Court could identify the exact nature and limits of the market failure(s), if any, that unbridled rivalry for players might produce.

If the Court had determined that the challenged restraints may produce redeeming virtues and thus survive *per se* condemnation, it could then have opined on how to assess such agreements under the rule of reason. Instead of asking how to make out a prima facie case in a vacuum, as it did in *NCAA*, or parroting the approach taken by the Ninth Circuit, the Court could have tailored this methodology to the nature of the redeeming virtues that the restraints might produce.[357] For instance, if the restraints survive *per se* condemnation because they might produce technological efficiencies, proof that they altered prices compared to a nonrestraint baseline should establish a prima facie case. On the other hand—and as seems more likely—they survive because unchecked bidding for the services of student-athletes could result in a market failure and suboptimal product quality; proof that the restraint reduces student-athlete compensation below what an unbridled market would produce should not itself establish a prima facie case. Such evidence would instead be equally consistent with a conclusion that the restraint eliminates this market failure and restores compensation to optimal levels.[358]

The Court could have also explained that proof that the restraint produces significant benefits by overcoming a market failure should rebut any presumption that such benefits coexist with harms if the plaintiff establishes a prima facie case based solely on actual detrimental effects.[359] Absent such coexistence, the rationale for balancing a restraint's harms against benefits evaporates, as does the

356. *See, e.g.*, Leegin Creative Leather Prods., Inc. v. PSKS, Inc., 571 U.S. 877, 913–14 (2007) (describing various benefits that minimum resale price maintenance can create); Nat'l Soc'y of Pro. Eng'rs v. United States, 435 U.S. 679, 679–80, 699 (1978) (rejecting defendants' claim that propensity of restraint to enhance product safety qualified as a redeeming virtue).

357. *See supra* Part II (explaining that methodology for establishing a prima facie case should depend upon the nature of redeeming virtues that prevent *per se* condemnation).

358. *See supra* notes 180–204 and accompanying text.

359. *See supra* notes 315–16 and accompanying text.

rationale for the less restrictive alternative test.[360] After all, if the presence of benefits rebuts the presumption of harm, then there is nothing to balance against such benefits. Nor is there any reason to assume that the challenged restraint is "restrictive" in any meaningful antitrust sense or to ask whether there is a "less restrictive" means of achieving the same benefits.

To be sure, the approach advocated here would have required the Court to abandon some previous pronouncements regarding the scope of the *per se* rule and the method of conducting rule of reason analysis. However, as noted earlier, *Standard Oil*'s rule of reason contemplates that courts will adjust Section 1 doctrine in light of evolving economic theory that alters judicial understanding of the consequences of challenged restraints.[361] For instance, overbroad applications of the *per se* rule in decisions such as *Topco*, which *NCAA* purported to reaffirm, ignored then-emerging developments in economic theory recognized in *Sylvania*, establishing that such restraints could overcome market failures and thus enhance interbrand competition.[362] Extension of these theoretical insights to the horizontal context would require rejection of *Topco* and similar decisions and concomitant contraction of the scope of the *per se* rule.

These same developments in economic theory also have implications for rule of reason analysis. Judicial and agency reliance on actual detrimental effects to establish a prima facie case ignores developments in economic theory, concluding that many restraints that survive *per se* condemnation do so because they overcome a market failure and suboptimal prices, for instance. Here again, *Standard Oil*'s admonition to adjust doctrine in light of evolving "economic conceptions" requires adjustment of antitrust doctrine despite any considerations of stare decisis. Thus, the Court should disavow decisions holding that proof of actual detrimental effects necessarily suffice to establish a prima facie case, regardless of why restraints avoid *per se* condemnation. The Court should also repudiate the outmoded judicial assumptions that benefits of such restraints necessarily coexist with harms and the related requirements that courts "balance" purported harms against actual benefits. By correcting these and other errors, the *Alston* Court could have ensured a more coherent Section 1 jurisprudence that better reflects the teachings of modern economic theory. Unfortunately, such corrections will have to take place some other time.

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360. *See supra* notes 317–21 and accompanying text.

361. *See supra* notes 36–68 and accompanying text; *see also* Bus. Elecs. Corp. v. Sharp Elecs. Corp., 485 U.S. 717, 732 (1988) ("The Sherman Act adopted the term 'restraint of trade' along with its dynamic potential.").

362. *See supra* Subparts I.B.1 & I.B.2.