The Failure of "Quick-Look" Analysis of Antitrust Claims

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Abstract

Before courts can determine whether a defendant may have violated the antitrust laws, the courts must first select the appropriate mode of analysis: the fact-intensive rule of reason, summary condemnation under the *per se* rules, or a quick-look analysis. Quick look is intended to shorten and simplify inquiries into conduct that does not fall under the *per se* rules but that nonetheless has obvious anticompetitive effects.

The quick-look doctrine, however, has failed to streamline antitrust litigation, and the related caselaw has failed to develop concrete or usable rules. Despite decades of litigation, quick-look analysis remains of dubious legal pedigree, of muddled application, and of questionable use.

Quick-look doctrine traces its origins to three Supreme Court cases that neither implemented nor even described a quick-look methodology. Later Supreme Court cases seemed to (somewhat ambiguously) endorse the doctrine as a matter of theory, but rejected its application in the cases before the Court. In the lower courts, quick look is frequently litigated but seldom applied. The handful of decisions where application of quick look was dispositive tend to be inconsistent with precedent or reversed in later proceedings.

Quick look's problems are endemic, and unfixable. At bottom, quick look depends on non-economist judges ruling, as a matter of law, regarding the economic effect of challenged conduct. Most judges are properly reluctant to moonlight as amateur economists. In case after case judges reject quick-look legal presumptions in favor of a fact-based rule-of-reason methodology. Rather than continuing with sterile debates over the applicability of quick look, courts should explicitly abandon the doctrine and refocus their attention on more productive questions, such as determining what sorts of evidence satisfy plaintiffs' burdens of proof under the rule of reason.

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I. INTRODUCTION

Sometimes the evidence in a lawsuit is so one-sided that it is obvious who is in the wrong. One might say that such cases can be decided in the twinkling of an eye. By contrast, antitrust litigation is notorious for being complicated and drawn-out, especially cases decided through fact-intensive inquires under the "rule of reason." But in its 1984 decision in NCAA v. Board of Regents, the Supreme Court said that even "the rule of reason can sometimes be applied in the twinkling of an eye."[2] That comment (and the fact that the Court didn't seem to break a sweat before condemning the conduct at issue) set off the effort by courts and commentators to develop the methodology now known as "quick look." The intention was to streamline cases challenging obviously anticompetitive agreements. But this effort failed. The quick-look methodology does not make antitrust litigation quicker or simpler. It is just one more thing to argue about, in cases that do not lack for highly technical controversies.

Traditionally, antitrust cases were analyzed under two frameworks: (1) the "rule of reason," which often requires a searching analysis of the relevant market and the potential harms and benefits of the challenged conduct; and (2) the "*per se*" rules, which allow summary condemnation of narrowly defined categories of conduct that are well known to be particularly and universally pernicious. But inspired by *Board of Regents*, most courts now say that there are three frameworks for analyzing antitrust claims, with the "quick-look" framework (also known as "inherently suspect") to be used for cases that do not fall neatly into a *per se* category, but do not require the extensive analysis one would present under the full-blown rule of reason.[3] Quick-look

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[2] NCAA v. Bd. of Regents of Univ. of Okla., 468 U.S. 85, 109 n.39 (1984).

[3] "When assessing whether a particular restraint inhibits competition, courts apply three categories of analysis: per se, quick-look, and rule of reason." *In re* Revlimid & Thalomid Purchaser Antitrust Litig., No. 19-07532, 2024 WL 2861865, *68 (D.N.J. June 6, 2024).

Accord, *e.g.*, Int'l Constr. Prods., LLC v. Caterpillar Inc., No. 15-00108, 2024 WL 1619836, *5 (D. Del. Apr. 15, 2024); *In re* Payment Card Interchange Fee & Merchant Discount Antitrust Litig., No. 05-MD-01720, 2024

analysis is said to be appropriate for cases "where a practice has obvious anticompetitive effects"—cases where "an observer with even a rudimentary understanding of economics could conclude that the arrangements in question would have an anticompetitive effect on customers and markets."[4]

But here's the problem. Until a judge actually sees all the evidence, the judge cannot know whether it is obviously one-sided. And before the evidence can be presented to the judge, the parties need to develop it and conduct discovery. As a result, courts' so-called "quick-look" analyses have been anything but quick looks. Quick-look doctrine does nothing to shorten discovery or other pre-trial proceedings, and courts have almost never condemned conduct under a quick-look analysis without first conducting a trial.

"Quick look" has also been used to lighten a plaintiff's burden of proof by using presumptions in place of evidence. Where a restraint is obviously likely to produce an anticompetitive effect, the argument goes, one should presume that such an effect actually occurred. In theory, this simplifies the analysis by excusing the plaintiff from providing extensive market analysis. But the effects of a restraint are not obvious if the defendant presents a procompetitive justification (a plausible contention that the restraint actually serves to sharpen competition, such as by creating efficiencies or enabling the defendant to provide a new or better product). And it is hard to make any predictions about how the conduct at issue might affect marketwide competition without first defining the market and then learning about it. So even in a quick-look case, all the thorny (and time-consuming) economic issues remain relevant.

WL 1142860, *6 (E.D.N.Y. Mar. 15, 2024); Batton v. Nat'l Ass'n of Realtors, No. 21-CV-00430, 2024 WL 689989, *5 (N.D. Ill. Feb. 20, 2024); *In re* RealPage, Inc., Rental Software Antitrust Litig. (No. II), No. 23-MD-03071, 2023 WL 9004806, *22 & n.17 (M.D. Tenn. Dec. 28, 2023); Brown v. JBS USA Food Co., No. 22-CV-02946, 2023 WL 6294161, *12–13 (D. Colo. Sept. 27, 2023).

[4] Cal. Dental Ass'n v. FTC, 526 U.S. 756, 770 (1999).

More fundamentally, outside of the realm of the *per* se categories, economic analysis seldom yields intuitively obvious conclusions—especially to judges whose expertise lies in the law, not economics. When the parties and their experts join issue regarding the economic effects of challenged conduct, generalist judges are not, for the most part, equipped to determine the issue as a matter of law. Most judges respond by ruling that anticompetitive effect is a question of fact to be determined by the trier of fact. In other words, judges almost always require a rule-of-reason inquiry, rather than condemning a practice through quick-look presumptions.

Although quick look is seldom applied by the courts, it is frequently invoked by plaintiffs. Obtaining a ruling that the defendant's conduct "has obvious anticompetitive effects"[5] is a huge step towards victory. And because the contours of the doctrine are very vague, there is often at least *some* chance of successfully invoking quick look. Asking for quick-look condemnation of the defendant's conduct is usually a longshot, but (from the plaintiff's perspective) it is often a longshot worth taking. For the very same reasons, defendants have every incentive to vigorously fight these efforts and to develop the evidence that will take them outside of the realm of quick look.

The upshot of all this is that the good intentions behind the quick-look doctrine have backfired. It creates an additional issue for the parties to brief and for the courts to resolve. Quick look seldom has an impact on the outcome. In most lawsuits it is rejected; in most of the rest it is adopted only in the alternative to a ruling that the plaintiff won (or can proceed toward trial) on other grounds. Where adoption of a quick-look analysis actually does affect the trial court's verdict, appellate courts often reverse—or remand for further analysis under the rule of reason, thus making the case far more protracted than if the parties had simply proceeded under the rule

[5] *See California Dental*, 526 U.S. at 770.

of reason from the outset. And the opinions that apply quick look usually create splits of authority; the common-law process has failed to develop a coherent, consistent set of rules for applying quick-look analysis.

Quick look is a shortcut that creates long delays.

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This article will first describe the three frameworks for analyzing antitrust claims. Included in this section is a description of how the *per se* rules have evolved over time, an evolution that demonstrates the difficulties courts face when they try to craft rules based on presumptions, rather than evidence. Next, the article will examine the Supreme Court cases that relate to quick look, demonstrating that the legal foundations of the doctrine are weak and beset by vague and contradictory instructions from the Court.

The article then turns to an examination of how the quick-look doctrine has been applied by the lower courts, and chronicles its failures:

- Quick-look doctrine is seldom useful as a matter of theory, and is seldom meaningfully applied by the courts;
- Quick look is applied inconsistently to similar fact patterns, and courts have reached contradictory conclusions about the underlying doctrine;
- The courts have been unable to articulate a concrete, usable test for when quick look applies;
- Quick look fails to make cases quicker or less complex; and
- The theoretical availability of quick look induces litigants to waste time and effort debating its applicability.

This article then explores why the problem is unfixable, and why the quick-look doctrine should be discarded.

Lastly, the article proposed a path forward—for those circumstances where quick look comes closest to relevance, a refocusing away from debates over modes of analysis, and towards analyzing record evidence to resolve cases on their merits.

II. THE THREE MODES OF ANALYSIS

Section 1 of the Sherman Act prohibits "[e]very contract, combination . . . or conspiracy, in restraint of trade or commerce."[6] But "[e]very agreement concerning trade, every regulation of trade, restrains. To bind, to restrain, is of their very essence."[7] Since the great majority of contractual restraints do not harm competition, courts "have thus understood § 1 'to outlaw only *unreasonable* restraints.'"[8]

Courts employ three methodologies for determining whether a restraint is unreasonable: the rule of reason, *per se* rules, and quick look. But regardless of which methodology is used, "the essential inquiry remains the same—whether or not the challenged restraint enhances competition."[9]

A. The Rule of Reason

"The rule of reason is the default."[10] The rule calls on courts to undertake a searching inquiry to determine 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."[11] As stated in Justice Brandeis' 1918 opinion in *Chicago Board of Trade*:

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[6] 15 U.S.C. § 1.

[7] Bd. of Trade of Chi. v. United States, 246 U.S. 231, 238 (1918).

[8] *See* Ohio v. Am. Express Co., 585 U.S. 529, 540 (2018) (citation omitted).

[9] *Cal. Dental*, 526 U.S. at 779–80.

[10] United States v. Brewbaker, 87 F. 4th 563, 573 (4th Cir. 2023). *Accord* California *ex rel.* Harris v. Safeway, Inc., 651 F.3d 1118, 1133 (9th Cir. 2011) ("The rule of reason is the presumptive or default standard").

[11] *Chi. Bd. of Trade*, 585 U.S. at 238.

> 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.[12]

In the century since this rule of reason was articulated, the courts have developed and refined the nature of the inquiry. The leading Supreme Court case is now Ohio v. American Express Co., 585 U.S. 529 (2018), which largely synthesized the existing caselaw.

American Express sets out "a three-step, burden-shifting framework" that "requires courts to conduct a fact-specific assessment of 'market power and market structure to assess the restraint's actual effect' on competition."[13]

In step one, "the plaintiff has the initial burden to prove that the challenged restraint has a substantial anticompetitive effect that harms consumers in the relevant market."[14] To meet the step-one burden, the plaintiff must usually define, through economic evidence, an economically meaningful "relevant market."[15] "Without a definition of the market there is no way to measure the defendant's ability to lessen or destroy competition."[16] To show an anticompetitive effect within the relevant market, plaintiffs can use either direct or indirect evidence. "Direct evidence of anticompetitive effects would be proof of actual detrimental effects on competition,' such as reduced output, increased prices, or decreased quality in the relevant market. Indirect evidence

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[12] *Id.*

[13] *Am. Express*, 585 U.S. at 541 (quoting Copperweld Corp. v. Indep. Tube Corp., 467 U.S. 752, 768 (1984).

[14] *Id.*.

[15] *See id.* at 543 & n.7.

[16] *Id.* at 543 (quoting Walker Process Equip., Inc. v. Food Mach. & Equip. Corp., 382 U.S. 172, 177 (1965).

would be proof of market power plus some evidence that the challenged restraint harms competition."[17]

If the plaintiff succeeds in showing substantial anticompetitive harms, at the second step "the burden shifts to the defendant to show a procompetitive rationale for the restraint."[18] Finally, in step three, "the burden shifts back to the plaintiff to demonstrate that the procompetitive efficiencies could be reasonably achieved through less anticompetitive means."[19]

B. The Waxing and Waning of the *Per Se* Rules

From the start, the rule of reason came under criticism for being unfocused and for making antitrust litigation expensive, complicated, and protracted. In reaction, the courts tried to develop categorical rules—determinations that certain kinds of behavior are unreasonable under any circumstances. By 1940, the phrase "unlawful per se" had entered into the Supreme Court's antitrust lexicon.[20]

The *per se* rules, at least as initially conceived, had both a substantive and procedural component. Substantively, they declared that specified kinds of restraint are unreasonable as a matter of law. Procedurally, they were designed to simplify litigation by removing extraneous issues: if certain conduct is always unjustified, one does not need to investigate its effects or underlying motivations. As explained by the Supreme Court in its 1958 decision in *Northern Pacific Railway*:

> there are certain agreements or practices which because of their pernicious effect on competition and lack of any redeeming virtue are conclusively presumed to be unreasonable and therefore illegal without elaborate inquiry as to the precise harm they have caused or the business excuse for their use. This principle of per se

[17] *Id.* at 542 (quoting FTC. v. Ind. Fed'n of Dentists, 476 U.S. 447, 460 (1986)).

[18] *Id.* at 541.

[19] *Id.* at 542.

[20] *See* U.S. v. Socony-Vacuum Oil Co., 310 U.S. 150, 218 (1940).

> unreasonableness not only makes the type of restraints which are proscribed by the Sherman Act more certain to the benefit of everyone concerned, but it also avoids the necessity for an incredibly complicated and prolonged economic investigation into the entire history of the industry involved, as well as related industries, in an effort to determine at large whether a particular restraint has been unreasonable—an inquiry so often wholly fruitless when undertaken.[21]

Northern Pacific Railway identified "price fixing," "division of markets," "group boycotts," and "tying arrangements" as "unlawful in and of themselves."[22]

The world, however, is complicated, and it often does not line up with the neat abstractions featured in some of the *per se* decisions. One complication is that businesses very often band together not to corner the market but to more effectively compete in it. Manufacturers who face fierce competition, for example, commonly partner with their distributors to maximize the consumer appeal of their brands. These efforts often come with restraints; the manufacturer of a luxury brand might want to mandate that its distributors provide top-quality service, and a discount brand might be most competitive its distributors are forced to keep their prices low. As courts adjudicated the resulting antitrust disputes, they came to realize that the *per se* rules were prohibiting "intrabrand" restraints that actually served to increase "interbrand" competition.[23]

The Supreme Court first grappled with the overbreadth of the *per se* rules in the 1977 *GTE Sylvania* decision. There, the Court held that manufacturers did not commit a *per se* illegal market division when they assigned exclusive territories to their distributors.[24] Such restraints could increase interbrand competition by ensuring that "distributors earn sufficient profit to pay

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[21] N. Pac. Ry. Co. v. United States, 356 U.S. 1, 5 (1958).

[22] *Id. Accord* Klor's, Inc. v. Broadway-Hale Stores, Inc., 359 U.S. 207, 212 (1959).

[23] Intrabrand competition is "competition among the retailers who sell one manufacturer's product." Interbrand competition is "competition between manufacturers of similar products." United States v. Brewbaker, 87 F. 4th 563, 574 (4th Cir. 2023).

[24] *See* Cont'l T. V., Inc. v. GTE Sylvania Inc., 433 U.S. 36, 54–55, 57 (1977).

for programs such as hiring and training additional salesmen or demonstrating the technical features of the product, . . ."[25] "[T]he Court now routinely accepts that restraints boosting interbrand competition at the expense of intrabrand competition do *not* warrant *per se* treatment."[26]

Pro-competitive efficiencies are particularly common in "vertical" restraints (i.e. restraints "imposed by agreement between firms at different levels of distribution," such as between a manufacturer and its distributors, or a company and its suppliers).[27] Today all or almost all vertical restraints are evaluated under the rule of reason.[28]

Many "horizontal" restraints (i.e. restraints "imposed by agreement between competitors"[29]) must also be evaluated under the rule of reason. In particular, a rule-of-reason analysis is necessary where the competitors are engaged in a joint venture, or some other collaboration designed to create a product that the collaborators are unable to produce by themselves.[30] Even when the joint venturers impose a restraint on "nonventure activities," "courts must determine whether the nonventure restriction is a naked restraint on trade, and thus invalid, or one that is ancillary to the legitimate and competitive purposes of the business association, and thus valid."[31]

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[25] Bus. Elecs. Corp. v. Sharp Elecs. Corp., 485 U.S. 717, 728 (1988). *Accord* Leegin Creative Leather Prods., Inc. v. PSKS, Inc., 551 U.S. 877, 890–91 (2007) (discussing how resale price maintenance can increase interbrand competition).

[26] *Brewbaker*, 87 F. 4th at 574.

[27] *See Bus. Elecs.*, 485 U.S. 717 at 730.

[28] Ohio v. Am. Express Co., 585 U.S. 529, 540–41 (2018).

[29] *Bus. Elecs.*, 485 U.S. at 730.

[30] "When 'restraints on competition are essential if the product is to be available at all,' *per se* rules of illegality are inapplicable, and instead the restraint must be judged according to the flexible Rule of Reason." Am. Needle, Inc. v. NFL, 560 U.S. 183, 203 (2010) (citation omitted). *See also*, *e.g.*, Texaco Inc. v. Dagher, 547 U.S. 1, 1–2 (2006); Broad. Music, Inc. v. Columbia Broad. Sys., Inc., 441 U.S. 1, 2 (1979).

[31] *Texaco*, 547 U.S. at 7.

The requirement of distinguishing between "naked" and "ancillary" restraints erodes the procedural value of the *per se* rules. Although one might wish that courts had the ability to instantly identify and condemn *per se* conduct, "considerable inquiry into market conditions may be required before the application of any so-called '*per se*' condemnation is justified."[32]

The old categories of *per se* conduct still exist. But starting in 1977 with *GTE Sylvania*, a long string of Supreme Court decisions has limited these categories, time and again overruling more expansive holdings from earlier eras.

- Price fixing: The rule of reason is now applied to vertical price-fixing agreements, regardless of whether the agreement sets maximum[33] or minimum[34] prices. Even "price fixing in a literal sense" between horizontal competitors might not be "price fixing in the antitrust sense" when conducted in connection with a legitimate joint venture.[35]

- Market divisions: Vertical market division agreements are to be evaluated under the rule of reason.[36]

- Tying: "Over the years … [the Supreme] Court's strong disapproval of tying arrangements has substantially diminished."[37] Although a vestige of the *per se* rule remains, it requires plaintiffs to prove a raft of factual contentions.[38] Proof of market power must be proven, not merely presumed, even regarding patented products.[39]

- Group Boycotts: Although the "older group boycott cases" have not been explicitly overruled, their "rhetoric … cannot be taken at face value, and [] any *per se* group

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[32] Cal. Dental Ass'n v. FTC, 526 U.S. 756, 779 (1999) (citation omitted).

[33] *See* State Oil Co. v. Khan, 522 U.S. 3, 4–5 (1997), *overruling* Albrecht v. Herald Co., 390 U.S. 145 (1968).

[34] *See* Leegin Creative Leather Prods, Inc. v. PSKS, Inc., 551 U.S. 877, 907 (2007), overruling Dr. Miles Med. Co. v. John D. Park & Sons Co., 220 U.S. 373 (1911).

[35] *Texaco*, 547 U.S. at 6; *accord Broad. Music*, 441 U.S. at 9.

[36] *See* Cont'l T. V., Inc. v. GTE Sylvania Inc., 433 U.S. 36, 59 (1977), *overruling* United States v. Arnold, Schwinn & Co., 388 U.S. 365 (1967).

[37] Ill. Tool Works Inc. v. Indep. Ink., Inc., 547 U.S. 28, 35 (2006).

[38] The plaintiff must prove that "two separate product markets have been linked," the defendant has market power in the "tying" product market, the tying arrangement "restrain[ed] competition on the merits by forcing purchases that would not otherwise be made," and that "a substantial volume of commerce is foreclosed thereby." Jefferson Parish Hosp. Dist. No. 2 v. Hyde, 466 U.S. 2, 13–14, 16, 20–21, 27 (1984).

[39] *See Ill. Tool Works*, 547 U.S. at 28, abrogating multiple cases including Int'l Salt Co. v. United States, 332 U.S. 392 (1947).

> boycott 'label' is minimally useful."[40] Only horizontal group boycotts fall within the *per se* rule.[41] Even a horizontal refusal to deal is unlikely to be condemned *per se* unless it "cuts off access to a supply, facility, or market necessary to enable the boycotted firm to compete, [] the group possesses a dominant position in the relevant market, and [] the criticized practice is not justified by plausible arguments that it is intended to enhance overall efficiency and make markets more competitive."[42]

It is of course understandable that courts would want to craft *per se* rules that do away with the expense, length, and complication of full-blown rule-of-reason cases. But this effort has been only modestly successful. The caselaw now recognizes that presuming anticompetitive effects without demanding real-world proof is often counterproductive and results in courts penalizing business arrangements that enhance competition. As a result, the *per se* rules are now confined to a few, ever-narrowing categories of conduct.

C. The Quick-Look (and "Inherently Suspect") Rules

The retreat of the *per se* rules did nothing to quell the urge to use presumptions to simplify antitrust cases. Quick-look doctrine emerged to fill the gap — an intermediate method of analysis designed for cases where anticompetitive effects are too obvious to warrant proof, even when falling outside the shrinking bounds of the *per se* rules. Quick look is sometimes described as a kind of truncated rule-of-reason analysis,[43] and is sometimes described as a separate, third category.[44]

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[40] Am. Steel Erectors v. Loc. Union No. 7, 815 F.3d 43, 62 (1st Cir. 2016) (citation omitted).

[41] *See* NYNEX Corp. v. Discon, Inc., 525 U.S. 128, 128 (1998).

[42] Flaa v. Hollywood Foreign Press Ass'n, 55 F. 4th 680, 689 (9th Cir. 2022), discussing Nw. Wholesale Stationers, Inc. v. Pac. Stationery & Printing Co., 472 U.S. 284 (1985).

[43] *See*, *e.g.*, Deslandes v. McDonald's USA, LLC, 81 F.4th 699, 703 (7th Cir. 2023) ("quick-look analysis is part of the Rule of Reason").

[44] *See*, *e.g.*, Continental Airlines, Inc. v. United Airlines, Inc., 277 F.3d 499, 508-09 (4th Cir. 2002) ("the Supreme Court has authorized three methods of analysis").

The quick-look doctrine arose from the Supreme Court's observation that "the rule of reason can sometimes be applied in the twinkling of an eye."[45] As discussed below, the Supreme Court has been anything but clear in how that observation may be put into practice, and lower courts' efforts at implementation have been halting and inconsistent. But the most common formulation describes quick look as (a) being applicable where the anticompetitive nature of the challenged restraint is obvious, (b) triggering a legal presumption that the restraint caused an anticompetitive effect, and (c) shifting to the defendant the burden of justifying its conduct.

> To use the "quick look" approach, we must first determine whether "an observer with even a rudimentary understanding of economics could conclude that the arrangements in question would have an anticompetitive effect on customers and markets." Once it is established that the restraint is inherently suspect and the anticompetitive effects are easily ascertained, then the burden shifts to the [defendants] to produce evidence of procompetitive justification or effects and thus demonstrate the need for more extensive market inquiry, . . .[46]

The Federal Trade Commission has developed essentially the same test, although the Commission "often refers to this intermediate category of restraints as 'inherently suspect.'"[47] The FTC's "inherently suspect" framework is generally viewed as interchangeable with the quick-look approach.[48]

D. Academic Support for Quick-Look Analysis

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[45] NCAA v. Bd. of Regents of Univ. of Okla., 468 U.S. 85, 109 n.39 (1984).

[46] California *ex rel.* Harris v. Safeway, Inc., 651 F.3d 1118, 1138 (9th Cir. 2011) (citations omitted). *Accord* Polygram Holding, Inc. v. FTC, 416 F.3d 29, 36 (D.C. Cir. 2005) ("If, based upon economic learning and the experience of the market, it is obvious that a restraint of trade likely impairs competition, then the restraint is presumed unlawful and, in order to avoid liability, the defendant must either identify some reason the restraint is unlikely to harm consumers or identify some competitive benefit that plausibly offsets the apparent or anticipated harm.").

[47] Geoffrey Green, *Unflattering resemblance*, FTC (Jan. 13, 2015), https://www.ftc.gov/enforcement/competition-matters/2015/01/unflattering-resemblance.

[48] *See* 1-800 Contacts, Inc. v. FTC, 1 F. 4th 102, 115 & n.5 (2d Cir. 2021).

Academic literature has largely supported the development of a quick-look approach.[49] Professor Edward Cavanagh, for example, views quick look as holding out the promise of "more clarity, greater predictability, fewer errors and less expense in antitrust litigation."[50] This article and Professor Cavanagh are in agreement that it is rare for courts to actually utilize a quick-look methodology, and that part of the blame lies with the Supreme Court's mixed signals and lack of clear directions. But Professor Cavanagh views this as a lost opportunity and advocates for a revitalization of the quick-look doctrine. This article, however, argues that the inherent problems with quick look counsels against that approach.

Professor Christopher Leslie endorses quick-look as "a pro-plaintiff tool to more quickly and efficiently condemn restraints with obvious anticompetitive effects."[51] He further asserts that "[w]hen applied properly, the quick-look process facilitates accurate judicial decision-making while minimizing costs."[52] But these propositions are assumed rather than proved; the focus of Professor Leslie's article is to reject the idea that quick look can be used to approve obviously harmless restraints.[53] He raises valid concerns that judges who do not carefully scrutinize the evidence might fail to understand the actual effects of a challenged restraint. Professor Leslie

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[49] *See*, *e.g.*, Adrianna Exler, *Supreme Court "Quickly" Ends Circuit Split Over Reverse Payments Without the Adoption of a "Quick" Analysis: Why the Rule of Reason is Inferior to the "Quick Look" Rule of Reason*, 11 RUTGERS J. L. & PUB. POL'Y 740 (2014); Garry A. Gabison, *Juries Can Quick Look Too*, 10 SETON HALL CIR. REV. 271 (2014).

But 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 (2016) (arguing that quick look has not delivered any of its anticipated benefits, and arguing for greater use of *per se* rules).

[50] Edward D. Cavanagh, *Whatever Happened to Quick Look?*, 26 U. MIAMI BUS. L. REV. 39, 41 (2017).

[51] Christopher R. Leslie, *Disapproval of Quick-Look Approval: Antitrust After NCAA v. Alston*, 100 WASH. U. L. REV. 1, 17-18 (2022).

[52] *Id.* at 18-19.

[53] *See generally id.* (discussing NCAA v. Alston, 594 U.S. 69, 89 (2021), and rejecting the Supreme Court's statement that "some restraints may be so obviously incapable of harming competition that they require little scrutiny").

errs, however, in assuming that attempts to identify "obviously anticompetitive" restraints are more likely to succeed than attempts to identify restraints that are obviously incapable of harming competition.

III. THE QUICK LOOK RULE IN THE SUPREME COURT

The Supreme Court has never actually applied a "quick-look" analysis. The cases that inspired the doctrine make no reference to such a methodology. Even after lower courts began discussing quick look, some subsequent Supreme Court opinions make no mention of the "quick look" methodology at all, including the *American Express* case that provides detailed guidance on how to engage in a "rule of reason" analysis.[54] The Supreme Court opinions that explicitly discuss "quick look" seem to approve of the doctrine as a theoretical matter while, in each case, nevertheless finding it inapplicable to the matter at hand.

A. The "Quick Look" Cases That Weren't

The "quick look" methodology is generally traced back to three Supreme Court cases that were decided between 1978 and 1986.[55] In each of these cases, the Court rejected the use of *per se* condemnation, but the plaintiffs nonetheless prevailed: National Society of Professional Engineers v. United States, 435 U.S. 679 (1978), NCAA v. Board of Regents of the University of Oklahoma, 468 U.S. 85 (1984) (*"Board of Regents"*), and FTC v. Indiana Federation of Dentists, 476 U.S. 447 (1986).

These three cases share certain notable features. First, the phrase "quick look" never appears. Nor do the words "quick," "quickly," "abbreviated," or "inherently suspect." Second, there was nothing "quick" about the underlying legal proceedings, nor did the Supreme Court

[54] *See* Ohio v. Am. Express Co., 585 U.S. 529, 540–43 & n.7 (2018).

[55] *See* Cal. Dental Ass'n v. FTC', 526 U.S. 756, 770 (1999) (discussing the evolution of the "quick-look" analysis).

suggest that the underlying proceedings should or could have been abbreviated. Third, in each case there was clear evidence of actual (not just presumed) anticompetitive effect. And fourth, the defendants were entirely unable to proffer evidence of a justification that was cognizable under the antitrust laws.

The plaintiffs did not win any of these cases through the use of a quick-look methodology, nor from any short cuts, presumptions, or shifts in the burden of proof. Rather, the plaintiffs won these cases by mustering overwhelming evidence.

1. *Professional Engineers*

In *Professional Engineers*, the United States challenged a "canon of ethics" that explicitly prohibited engineers from engaging in "competitive bidding." This canon was "uniformly interpreted" as "prohibiting the submission of any form of price information to a prospective customer which would enable that customer to make a price comparison on engineering services."[56] This restraint was analyzed under the rule of reason; there was no explanation of why the *per se* methodology was not used.

There was no dispute that the purpose and effect of the challenged agreement (the canon against competitive bidding) was to maintain price levels. Rather, the defendant's position was that competitive bidding was contrary to the public interest because it would "lead to deceptively low bids, and would thereby tempt individual engineers to do inferior work with consequent risk to public safety and health."[57]

The Supreme Court rejected this rationale, holding that "the Rule of Reason does not support a defense based on the assumption that competition itself is unreasonable."[58] "The

[56] Nat'l Soc'y of Pro. Eng'rs v. United States, 435 U.S. 679, 683 & n.3 (1978).

[57] *Id.* at 693.

[58] *Id.* at 696.

Sherman Act reflects a legislative judgment that ultimately competition will produce not only lower prices, but also better goods and services."[59] The engineers' agreement could therefore be condemned without determining whether price competition would in fact result in lower quality or safety concerns. In short, *Professional Engineers* stands for the proposition that horizontal competitors cannot justify an agreement "to refuse to discuss prices" by arguing that price competition is undesirable.[60]

This case is often cited as supporting the use of a quick-look methodology because, although the challenged agreement "is not price fixing as such, no elaborate industry analysis is required to demonstrate the anticompetitive character of such an agreement."[61] But notably, the Court did not suggest that the work undertaken by the trial court was "quick" or in any sense perfunctory. "The parties compiled a voluminous discovery and trial record," and "[t]he District Court made detailed findings . . . ."[62]

2. *Board of Regents*

In *Board of Regents*, two universities challenged rules imposed by the NCAA regarding the broadcasting of college football games.[63] The NCAA, through these rules and through contracts with television networks, required each network to pay a "minimum aggregate compensation" for the games it broadcasted, limited the number of times each university could televise its games, and limited the total number of college games that could be televised.[64] After

[59] *Id.* at 695.

[60] *Id.* at 692.

[61] *Id.* at 692.

[62] *Id.* at 685–86.

[63] NCAA v. Bd. of Regents of Univ. of Okla., 468 U.S. 85, 88 (1984).

[64] *Id.* at 93, 94.

a "full trial,"[65] the district court found the rules to be an antitrust violation, enjoined the practice, and wrote a 53-page opinion setting out its factual findings and rationale.[66] The Tenth Circuit affirmed on liability, although it somewhat modified the injunction.[67]

The Supreme Court held that the NCAA's television rules could not be condemned *per se*. Although the rules constituted "[h]orizontal price fixing and output limitation . . . .this case involves an industry in which horizontal restraints on competition are essential if the product is to be available at all."[68] After all, a sports league could hardly function without the teams agreeing with each other on a host of issues.[69]

Turning to a rule-of-reason analysis, the Court had no trouble locating anticompetitive effects: the NCAA's rules reduced output (the number of televised football games) and increased the prices networks paid for television rights, with both price and output "unresponsive to consumer preference."[70] The NCAA was found to "possess market power" in a market properly defined as being restricted to college football (and indeed the NCAA had no competitors in this market).[71] The NCAA's defenses were each examined, and found to be either contrary to the evidence, non-cognizable, or both.[72]

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[65] *Id.* at 95.

[66] Bd. of Regents of Univ. of Okla. v. NCAA, 546 F. Supp. 1276 (W.D. Okla. 1982).

[67] *See* Bd. of Regents of Univ. of Okla. v. NCAA, 707 F.2d 1147 (10th Cir. 1983).

[68] *Board of Regents*, 468 U.S. at 100, 101.

[69] An attempt to market "contests between competing institutions" would "be completely ineffective" without a "myriad of rules affecting such matters as the size of the field, the number of players on a team, and the extent to which physical violence is to be encouraged or proscribed . . . ." *Id.*

[70] *Id.* at 104–07.

[71] *Id.* at 111; *accord id.* at 115 ("broadcasting rights to college football constitute a unique product for which there is no ready substitute," and competitors are "nonexistent").

[72] *Id.*at 113–20.

In short, the Court conducted a thorough analysis under the full-blown rule of reason and affirmed the district court's finding that the NCAA's rules violated the Sherman Act.

Some of the discussion regarding market power, however, became the foundation of the quick-look doctrine. The Court wrote that it had "never required proof of market power" where a "naked restriction" rendered price and output "[un]responsive to consumer preference."[73] "[N]o elaborate industry analysis is required to demonstrate the anticompetitive character of such an agreement."[74] Thus "[t]here was no need for the [plaintiffs] to establish monopoly power in any precisely defined market …."[75] Although the Court found that the plaintiffs actually *did* make that showing, the "essential point" that later morphed into the quick-look doctrine is that "the rule of reason can sometimes be applied in the twinkling of an eye."[76]

The Court's "twinkling" language originated with Harvard's Professor Phillip Areeda, whom the Court quoted at length.[77] Professor Areeda had argued that the rule of reason is sufficiently flexible that a plaintiff might win on summary judgment where the "obvious truths" established all the elements of a violation and where there was no colorable pro-competitive justification.[78]

3. *Indiana Federation of Dentists*

In *Indiana Federation*, as in *Professional Engineers* and *Board of Regents*, the Supreme Court did not claim to be following a "quick-look" methodology. And the underlying

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[73] *Id.* at 109–10.

[74] *Id.* at 109 (quoting Nat'l Soc'y of Pro. Eng'rs v. United States, 435 U.S. 679, 692 (1978).

[75] *Id.* at 110 n.42.

[76] *Id.* at 110 n.39 (citation omitted).

[77] *See id.* (quoting P. Areeda, The "Rule of Reason" in Antitrust Analysis: General Issues 37–38 (Federal Judicial Center, June 1981, www.fjc.gov/sites/default/files/2012/Antitrust.pdf (last visited July 19, 2024), at 37-38).

[78] *See id.*

proceedings were "lengthy," and included "a full evidentiary hearing" before an administrative law judge, detailed opinions from both the judge and the FTC, and an appeal.[79]

Indiana Federation involved the then-new practice of health insurers reviewing medical and dental procedures and denying coverage to treatment that they believed to be unnecessary. To thwart such reviews, numerous Indiana dentists (and a trade association) agreed that they would not provide x-rays to insurers. This concerted action was effective in preventing the insurers from gaining access to x-rays.[80]

The Supreme Court declined to employ a *per se* methodology because the facts were too dissimilar to the prototypical group boycott.[81] However, finding liability under the rule of reason was "not a matter of any great difficulty."[82] There was clear evidence of a horizontal agreement to refuse to provide a service requested by consumers and their insurers, "proof of actual detrimental effects" (the unavailability of x-rays), and no cognizable justification.[83] As in *Professional Engineers*, "[w]hile this is not price fixing as such, no elaborate industry analysis is required to demonstrate the anticompetitive character of such an agreement."[84]

What gives legs to the argument that *Indiana Federation* approved a "quick look" methodology is that the FTC prevailed without precisely defining a relevant market. The Supreme Court found that market definition was unnecessary: the challenged agreement was a

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[79] FTC v. Ind. Fed'n of Dentists, 476 U.S. 447, 451 (1986); *In re* Ind. Fed'n of Dentists, 101 F.T.C. 57, 1983 WL 486307 (FTC 1983); Ind. Fed'n of Dentists v. FTC', 745 F.2d 1124 (7th Cir. 1984).

[80] *Ind. Fed'n*, 476 U.S. at 455–57.

[81] *Id.* at 458.

[82] *Id.* at 459.

[83] *See id.* at 459–63. The Court understood the justification for the policy to be, in effect, that price competition is undesirable because it would lead to the provision of substandard services. The Court viewed this argument to be a non-cognizable "frontal assault on the basic policy of the Sherman Act." *Id.* at 463.

[84] *Id.* at 459, quoting Nat'l Soc'y of Pro. Eng'rs v. United States, 435 U.S. 679, 692 (1978).

"naked" horizontal restraint, and there was direct evidence of anticompetitive effects. Specifically, x-rays were unavailable where the defendants were concentrated but readily available elsewhere.[85] (It is also worth noting that the FTC *did* explicitly find market power, both from the conspiracy's share of participating dentists in Indiana and selected counties, and from the effect of the conspiracy on the availability of x-rays.[86])

* * * * *

These cases can be interpreted two ways. One interpretation is that, upon proof of certain predicate facts (naked, unjustified horizontal restraints coupled with direct evidence of anticompetitive effects), the mode of analysis shifts: "such a restriction requires some competitive justification even in the absence of a detailed market analysis."[87] This, in other words, is a form of the "quick look" doctrine.[88]

But the better interpretation is that these cases did not introduce a new method of analysis. Rather, they stand for nothing more than the intuitive proposition that it is easy to decide cases where the evidence is entirely one-sided—even in the world of antitrust. Such a holding is not terribly profound, nor novel, nor does it give rise to a new doctrine with a catchy name. But this interpretation is truer to what the Supreme Court was actually doing. More importantly, the 38 years following *Indiana Federation* have shown that the simpler interpretation is a better way to deal with antitrust cases.

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[85] *Ind. Fed'n*, 476 U.S. at 460–61.

[86] *In re Ind. Fed'n*, 101 F.T.C. at 77.

[87] *See Ind. Fed'n*, 476 U.S. at 460.

[88] Note that although anticompetitive effect was proven through evidence in each of these cases, the quick-look doctrine is usually described as presuming, rather than proving, anticompetitive effect due to the "obviously" anticompetitive nature of the restraint. *See*, *e.g.*, Winn-Dixie Stores, Inc. v. E. Mushroom Mktg. Coop., Inc., 89 F. 4th 430, 438 (3d Cir. 2023).

B. The Supreme Court Opinions That Refused to Apply a "Quick-Look" Methodology

The Supreme Court has issued four antitrust opinions that discuss the quick-look methodology.[89] Unfortunately, these cases have created more confusion than clarity, with the Court being inconsistent regarding what quick look means, and whether it exists at all. Only one point emerges with clarity: the Supreme Court has never found the "quick-look" methodology to be useful in any case that has come before it.

1. *California Dental Association*

The phrase "quick look" entered the Supreme Court's antitrust lexicon in *California Dental*. That case involved the FTC's efforts to curb, once again, what it viewed as anticompetitive practices among dentists. A professional association, the California Dental Association, had banned false or misleading advertising through a "Code of Ethics." The FTC found that this benign-sounding Code, as actually applied, impermissibly restricted the ability of dentists to compete by advertising their superior price or quality.[90] The FTC's decision, as well as the affirmance of the court of appeals, relied upon a "quick-look" analysis.

The Supreme Court surveyed the cases discussed above in Section III(A), noted that these cases "have formed the basis for what has come to be called abbreviated or 'quick-look' analysis under the rule of reason," and stated that in each of these precedents "an observer with even a rudimentary understanding of economics could conclude that the arrangements in question would have an anticompetitive effect on customers and markets."[91] But an abbreviated review was not appropriate under the facts presented in *California Dental*. The advertising restrictions in

[89] *See* NCAA v. Alston, 594 U.S. 69 (2021); 'FTC v. Actavis, Inc., 570 U.S. 136 (2013); Texaco Inc. v. Dagher, 547 U.S. 1 (2006); Cal. Dental Ass'n v. FTC, 526 U.S. 756 (1999).

[90] *Cal. Dental*, 526 U.S. at 759–62.

[91] *Id.* at 770.

question were "at least on their face, designed to avoid false or deceptive advertising," and "might plausibly be thought to have a net procompetitive effect, or possibly no effect at all on competition."[92] The Court therefore vacated the judgment in favor of the FTC and remanded "for a fuller consideration of the issue."[93] On remand, the Ninth Circuit found the advertising restraints to be lawful.[94]

Despite the *California Dental* court's disposition of the case before it, proponents of quick look view *California Dental* as endorsing it as a matter of doctrine. But *California Dental* casts doubt as to whether "quick look" exists as a discrete category of cases at all. The Court instead called for a "sliding scale" or "spectrum" to be applied, with some cases requiring more in-depth analysis than others.

> The truth is that our categories of analysis of anticompetitive effect are less fixed than terms like "*per se*," "quick look," and "rule of reason" tend to make them appear. . . . As the circumstances here demonstrate, there is generally no categorical line to be drawn between restraints that give rise to an intuitively obvious inference of anticompetitive effect and those that call for more detailed treatment.[95]

2. *Texaco Inc. v. Dagher*

Texaco and Shell Oil had been competitors in the sale of gasoline in the western United States. In 1998, they created an economically integrated joint venture—Equilon—which "set a single price for both Texaco and Shell Oil brand gasoline."[96] The plaintiffs accused Texaco and Shell of *per se* price-fixing, and the Ninth Circuit agreed.

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[92] *Id.* at 771.

[93] *Id.* at 781.

[94] Cal. Dental Ass'n v. FTC, 224 F.3d 942, 943 (9th Cir. 2000).

[95] *Cal. Dental*, 526 U.S. at 779, 780–81.

[96] Texaco Inc. v. Dagher, 547 U.S. 1, 3 (2006).

The Supreme Court reversed in a very brief opinion. The plaintiffs had not challenged the formation of the Equilon joint venture, a challenge that would have been evaluated under the rule of reason. Because of this tactical choice, there was no evidence that the joint venture itself was unlawful. But if it was proper to enter into the joint venture, there was nothing unlawful about a joint venture setting the prices of its own products: "though Equilon's pricing policy may be price fixing in a literal sense, it is not price fixing in the antitrust sense."[97]

Texaco addresses the "quick look doctrine" in a short footnote. As in *California Dental*, the Court indicates that such a doctrine might be applicable in other cases, but not in the case before the Court.

> To be sure, we have applied the quick look doctrine to business activities that are so plainly anticompetitive that courts need undertake only a cursory examination before imposing antitrust liability. But for the same reasons that per se liability is unwarranted here, we conclude that petitioners cannot be held liable under the quick look doctrine.[98]

[97] *See id.* at 5–7 & n.1.

[98] *Id.* at 7 n.3 (citation omitted).

3. *Actavis*

It is common for makers of brand-name pharmaceuticals to sue generic manufacturers for patent infringement even before the first sale of a generic product. Because there have been no infringing sales, there are no damages involved. Rather, the primary issue is whether the patent is enforceable against the generic manufacturer—which would bar the generic product from the market until the patent expires—or whether the patent is invalid or not infringed—in which case the generic product can be sold as soon as approved by the FDA. These "Hatch-Waxman" patent cases typically settle through an agreement setting a date on which the generic product is licensed to launch. In some of these settlements the brand-name manufacturer allegedly paid money to the generic manufacturer in exchange for delaying the launch of the generic products, a practice that antitrust plaintiffs claim is an unlawful "pay-for-delay" market division scheme.

Actavis was largely concerned with the substantive issue of whether "pay-for-delay" agreements could violate the antitrust laws. The Court held that such "reverse payment" agreements could indeed be illegal in some circumstances. The Court then turned to the question of whether legality should be determined through a "quick look" or "rule of reason" methodology; the FTC had argued that "reverse payment settlement agreements are presumptively unlawful."[99]

On this point, the Court ruled against the FTC, holding that a "quick look" approach "is appropriate only where an observer with even a rudimentary understanding of economics could conclude that the arrangements in question would have an anticompetitive effect on customers and markets."[100] But the Court then reiterated that "'there is always something of a sliding scale

[99] FTC v. Actavis, Inc., 570 U.S. 136, 158–59 (2013).

[100] *Id.* at 159 (citation omitted).

in appraising reasonableness,' and as such 'the quality of proof required should vary with the circumstances.'"[101]

4. *NCAA v. Alston*

In *Alston,* the Supreme Court again found that NCAA rules violated the antitrust laws. In *Board of Regents*, the offending rules limited the broadcast of football games. *Alston* involved rules "limiting the education-related benefits schools may offer student-athletes—such as rules that prohibit graduate or vocational school scholarships."[102]

The district court in *Alston* had applied a full-blown rule-of-reason inquiry, featuring "a 10-day bench trial . . . . experts and lay witnesses from both sides, . . . volumes of evidence . . . and an exhaustive decision."[103] By the time the Supreme Court received the case, it was uncontested that the NCAA was a monopolist in a well-defined market and that the challenged restraints were entered into among horizontal competitors. Ot was also uncontested that the restraints both decreased the compensation received by student-athletes as well as "participation by student-athletes in the relevant labor market — so that price and quantity are both suppressed."[104] "Put simply, this suit involves admitted horizontal price fixing in a market where the defendants exercise monopoly control."[105]

The parties' positions in *Alston* regarding quick look were something of an oddity. Usually, it is the plaintiff who seeks to avoid a full-blown rule-of-reason analysis by arguing that a quick look suffices to prove the illegality of the challenged conduct. In *Alston*, it was the

[101] *Id.*, quoting Cal. Dental Ass'n v. FTC, 526 U.S. 756, 780 (1999).

[102] NCAA v. Alston, 594 U.S. 69, 74 (2021).

[103] *Id.* at 80. The district court opinion runs for 53 pages. *See In re* NCAA Athletic Grant-in-Aid Cap Antitrust Litig., 375 F. Supp. 3d 1058 (N.D. Cal. 2019).

[104] *Alston*, 594 U.S. at 86.

[105] *Id.*

defendant—seeking to reverse a judgment that rested on "exhaustive" evidence[106]—that argued that legality could be established through a quick look.

The Supreme Court acknowledged that in principle "some restraints may be so obviously incapable of harming competition that they require little scrutiny," just as "some agreements among competitors so obviously threaten to reduce output and raise prices that they might be condemned as unlawful *per se* or rejected after only a quick look."[107] But, the Court held, the facts presented in *Alston* did not allow either party to win in the proverbial "twinkling of an eye."[108] It is difficult to condemn the workings of a joint venture without engaging in more detailed analysis. Sports leagues in particular must issue rules that enable sports competitions to go forward, "on things like how many players may be on the field or the time allotted for play."[109]

However, the obvious legality of playing-field rules does not mean that every rule implemented by a sports league is lawful. Given the *Alston* plaintiffs' evidence of monopsony power and actual adverse effects on price and output, the rule-of-reason condemnation of the challenged rules would not be reversed through recourse to a high-level quick-look determination.

Alston undercuts the notion that "quick look" is a mode of analysis distinct from the usual rule-of-reason test. Similar to the "sliding scale" language in *Actavis*, *Alston* holds that "what is required to assess whether a challenged restraint harms competition can vary depending on the

[106] The Supreme Court referenced "an exhaustive trial," "an exhaustive decision," and "an exhaustive factual record." *Id.* at 74, 80. 107.

[107] *Id.* at 88, 89.

[108] *See id.* at 90–91.

[109] *Id.* at 90.

circumstances. The whole point of the rule of reason is to furnish an enquiry meet for the case, looking to the circumstances, details, and logic of a restraint . . . ."[110]

IV. THE FAILURE OF THE "QUICK LOOK" METHODOLOGY

Forty years have elapsed since the Supreme Court decided *Board of Regents*—plenty of time for the quick look methodology to demonstrate its worth. The record, however, shows that the experiment is a failure. The methodology is seldom useful and seldom used. It is not that the methodology has been forgotten. Far from it—in case after case courts dutifully recite the need to determine whether quick look should be applied.[111] The problem is that despite decades of court opinions, the contours of the doctrine have not coalesced into a usable standard. Rather, quick look creates unnecessary confusion and unnecessary work.

A. The "Quick Look" Standard Is Inapplicable Except In Narrow Circumstances That Are Subject To Broad Exceptions

In *Alston*, the Supreme Court indicated that there are circumstances where "the competitive effects of a challenged restraint" can be determined "in a twinkling of an eye."[112] "That is true, though, only for restraints at opposite ends of the competitive spectrum. . . . rather than restraints in the great in-between."[113] Thus, even in theory, "[f]ew situations justify a 'quick look' review . . . ."[114]

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[110] *Id.* at 97 (citation omitted).

[111] *See* note 3 above (collecting six cases from 2023-2024).

The D.C. Circuit rejected the "trichotomy" of "quick look," "*per se*," and "rule of reason," holding that the Supreme Court "has backed away from any reliance on fixed categories and toward a continuum." Polygram Holding, Inc. v. FTC, 416 F.3d 29, 35 (D.C. Cir. 2005) (discussing *California Dental*, 526 U.S. at 779). *Polygram*, however, is an outlier.

[112] *Id.* at 88.

[113] *Id.*

[114] United States v. Booz Allen Hamilton Inc., No. 22-01603, 2022 WL 9976035, *4 (D. Md. Oct. 17, 2022). *Accord* Wyndham Vacation Ownership, Inc. v. Montgomery Law Firm, LLC, No. 19-CV-01895, 2021 WL 4948151, *16 (M.D. Fla. Oct. 18, 2021) (rejecting request to use the "seldom used quick look test" as an unjustified

Joint ventures, for example, are seldom subject to *per se* or quick look analysis due to their potential to "enable firms to do something more cheaply or better than they did it before. . . . the fact that joint ventures can have such procompetitive benefits surely stands as a caution against condemning their arrangements too reflexively."[115]

Another significant restriction on the use of quick look is that courts do not apply it when significant elements of the case are in dispute. In *California Dental*, for example, the Supreme Court reversed a judgment that was predicated upon only a quick look because the restraint in question "***might plausibly*** be thought to have a net procompetitive effect, or possibly no effect at all on competition."[116] "As a matter of economics [defendant's] view may or may not be correct, but it is not implausible, and neither a court nor the [FTC] may initially dismiss it as presumptively wrong."[117] Thus, the Third Circuit held, "[o]nce a defendant comes forward with plausible procompetitive justification for the challenged restraint, the 'quick look' presumption disappears and the overall reasonableness of the restraint is assessed using a full-scale rule of reason analysis."[118]

"deviation from the norm"); *see also* Lumber Liquidators, Inc. v. Cabinets to Go, LLC, 415 F. Supp. 3d 703, 712 n.9 (E.D. Va. 2019) ("lower courts appear to have largely abandoned the quick look approach").

[115] *Alston*, 594 U.S. at 88 (citation omitted); *accord* Texaco Inc. v. Dagher, 547 U.S. 1, 7 n.3 (2006) (pricing activities of legitimate joint venture not subject to quick look analysis).

Justice Sotomayor, when she was serving on the Second Circuit, wrote that a *per se* or quick-look approach could apply to joint ventures if (1) the "joint venture is essentially a sham, offering no reasonable prospect of any efficiency-enhancing benefit to society"; or "(2) where a particular challenged restraint is not reasonably necessary to achieve any of the efficiency-enhancing benefits of a joint venture and serves only as naked restraint against competition." Major League Baseball Props., Inc. v. Salvino, Inc., 542 F.3d 290, 338 (2d Cir. 2008) (Sotomayor, J., concurring). Both then-Judge Sotomayor and the majority opinion in *Salvino* rejected application of quick look to Major League Baseball's licensing activities.

[116] Cal. Dental Ass'n v. FTC, 526 U.S. 756, 771 (1999) (emphasis added).

[117] *Id.* at 775.

[118] Deutscher Tennis Bund v. ATP Tour, Inc., 610 F.3d 820, 833 (3d Cir. 2010) (citation omitted). *Accord* Cont'l Airlines, Inc. v. United Airlines, Inc., 277 F.3d 499, 514 (4th Cir. 2002) ("the possibility that the restriction might have procompetitive effects or no effect at all — ruled out the indulgently abbreviated review" of the quick look method) (citations omitted).

Examples abound of courts rejecting quick-look analysis because the defendant asserted plausible procompetitive benefits.[119] Where "the parties have submitted … a large and diverse volume of competing economic analyses[,] any starting presumption … would do little to help resolve the ultimate question in this case: that is, what impact the challenged restraint has on competition in the relevant markets."[120]

Other courts have rejected quick look where the market definition was in dispute. As the Third Circuit explained, such a dispute means that "the contours of the market here are not sufficiently well known or defined to permit the court to ascertain without the aid of extensive market analysis whether the challenged practice impairs competition . . . ."[121]

B. Quick Look Analysis Is Rarely Applied, and Is Generally Not Useful When Applied

Given the theoretical limitations on use of the quick look doctrine, it is not hard to find opinions that refuse plaintiffs' entreaties to condemn a practice based upon a quick look.[122] One can also find cases where the quick look doctrine was applied, but did not make a difference—

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[119] *See*, *e.g.*, *Cont'l Airlines*, 277 F.3d at 517 (reversing and remanding quick look condemnation, and requiring developing and assessing a full evidentiary record); Giordano v. Saks Inc., 654 F. Supp. 3d 174, 202–03 (E.D.N.Y. 2023) (granting motion to dismiss and rejecting quick look methodology where challenged restraint "might plausibly" have procompetitive benefits); *In re* Int. Rate Swaps Antitrust Litig., No. 16-MD-02704, 2019 WL 1147149, *15 n.8, *36 (S.D.N.Y. Mar. 13, 2019) (same, denying motion to amend complaint); Surf City Steel, Inc. v. Int'l Longshore and Warehouse Union, No. 14-05604, 2017 WL 5973279, *6 n.6, *12 (C.D. Cal. Mar. 7, 2017) (same, dismissing complaint with prejudice). *Accord In re* NCAA Student-Athlete Name & Likeness Licensing Litig., 37 F. Supp. 3d 1126, 1137 (N.D. Cal. 2014) ("a 'quick look' analysis is not appropriate here" because the challenged restraint "could conceivably enhance competition").

[120] *In re NCAA Student-Athlete Name & Likeness Licensing Litig.*, 37 F. Supp. 3d at 1137.

[121] *Deutscher*, 610 F.3d at 832 (citation omitted). *Accord In re* HIV Antitrust Litig., 656 F. Supp. 3d 963, 995 n.24 (N.D. Cal. 2023) ("Here, it is hard to say that anticompetitive effects are obvious if only because whether there are anticompetitive effects will turn in part on what the product market is.").

[122] The Supreme Court has rejected quick look in every case where the issue arose. *See* FTC v. Actavis, Inc., 570 U.S. 136 (2013); Texaco Inc. v. Dagher, 547 U.S. 1 (2006); *Cal. Dental*, 526 U.S. 756.

Just since 2021, at least four courts of appeal have rejected the use of quick look; none, within that time period, has implemented quick look. *See* Watson Lab'ys, Inc. v. Forest Lab'ys Inc., 101 F. 4th 223, 237–38 (2d Cir. 2024); Winn-Dixie Stores, Inc. v. E. Mushroom Mktg. Coop., Inc., 89 F. 4th 430, 440–42 (3d Cir. 2023); Aya Healthcare Servs., Inc. v. AMN Healthcare, Inc., 9 F. 4th 1102, 1113 n.6 (9th Cir. 2021); 1-800 Contacts, Inc. v. FTC, 1 F. 4th 102, 116 (2d Cir. 2021).

cases where the restraint was *per se* illegal in any event,[123] or where the plaintiff had also proven a rule-of-reason case.[124] There is even an appellate decision where the court applied the "quick look" doctrine—but the plaintiff lost anyway.[125] And there are a number of cases where a decision to use a quick-look analysis was later reversed.[126]

It is harder to find cases where the quick look doctrine actually makes a difference — cases where (a) the *per se* rule is inapplicable, (b) the plaintiff cannot (or does not want to) provide evidence sufficient under the rule of reason, (c) the restraint is deemed anticompetitive

[123] *E.g.* United States v. Apple, Inc., 791 F.3d 290, 330 (2d Cir. 2015) ("Here, the same evidence supporting our determination that *per se* condemnation is the correct way to dispose of this appeal also supports at most a 'quick look' inquiry under the rule of reason.").

[124] The FTC, examining restraints on real estate listing services, found the restraints unlawful under both an "inherently suspect" (quick look) mode of analysis, as well as under a full-blown rule-of-reason inquiry. *In re*Realcomp II Ltd., No. 9320, 2007 WL 6936319, *17–21 (F.T.C. Oct. 30, 2009). The Sixth Circuit upheld the Commission "on the basis of the more extended rule-of-reason analysis without reaching the question of whether to apply quick-look analysis." Realcomp II, Ltd. v. FTC, 635 F.3d 815, 826 (6th Cir. 2011). *Accord* N.C. State Bd. of Dental Exam'rs v. FTC, 717 F.3d 359, 374 (4th Cir. 2013) (affirming decision of FTC, which found illegality "under both a quick-look analysis and a full rule of reason."); Teladoc, Inc. v. Tex. Med. Bd., 112 F. Supp. 3d 529, 536–37 (W.D. Tex. 2015).

[125] Agnew v. NCAA 683 F.3d 328, 337, 348 (7th Cir. 2012).

[126] *See Cal. Dental*, 526 U.S. 756; *1-800 Contacts*, 1 F. 4th at 115–117; Cont'l Airlines, Inc. v. United Airlines, Inc., 277 F.3d 499, 503 (4th Cir. 2002); Worldwide Basketball & Sport Tours, Inc. v. NCAA, 388 F.3d 955, 961 (6th Cir. 2004); United States v. Brown Univ., 5 F.3d 658, 664, 679 (3d Cir. 1993). *See also* California *ex rel.* Harris v. Safeway, Inc., 651 F.3d 1118, 1119 (9th Cir. 2011) , acting en banc, rejected application of quick look rule and vacated a panel decision that had applied it).

(or at least potentially anticompetitive) under a quick look analysis, and (d) the decision to apply a quick look analysis was not later reversed. Such cases exist,[127] but they are rare.[128]

C. The "Quick Look" Standard Is Inconsistently Applied

The doctrine is further undermined by the splits of authority created by those judges who do employ quick look. For example, a recent district court decision applied the quick look because "in the context of the NCAA, courts typically apply a quick-look analysis."[129] Actually, most courts adjudicating antitrust claims against the NCAA have *rejected* the quick-look methodology.[130]

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[127] *See* N. Tex. Specialty Physicians v. FTC', 528 F.3d 346, 354, 370 (5th Cir. 2008) (largely affirming FTC decision based on a determination that the challenged practice was "inherently suspect"); Law v. NCAA, 134 F.3d 1010, 1012 (10th Cir. 1998) (affirming summary judgment granted to plaintiffs); Smart v. NCAA, No. 22-CV-02125, 2023 WL 4827366, *7 (E.D. Cal. July 27, 2023) (denying motion to dismiss); Yi v. SK Bakeries, LLC, No. 18-05627, 2018 WL 8918587, *5 (W.D. Wash. Nov. 13, 2018) (denying motion to dismiss). It should be noted that in one of these cases, *Yi*, the court denied a motion to dismiss a quick look claim only because defendants' justification was not contained in the complaint; the opinion casts doubt on whether the claim would survive when evidence could be considered. *See Yi*, 2018 WL 8918587, at *5.

The "Three Tenors" case—so nicknamed because the only products involved were albums featuring the singing of three opera stars—affirmed a judgment for the FTC using what is essentially a quick look analysis. The restraint in question (a 10-week moratorium on advertising two "Three Tenors" albums during the release of a third album) was condemned based on its close resemblance to price fixing, and its lack of a cognizable pro-competitive justification. No proof of "actual competitive harm" was required, nor did the decision even discuss what relevant markets were at issue. The D.C. Circuit, however, expressly rejected the label of "quick look" because the Supreme Court "has backed away from any reliance upon fixed categories and toward a continuum." Polygram Holding, Inc. v. FTC, 416 F.3d 29, 35 (D.C. Cir. 2005); *accord id.* at 36 ("[W]e reject PolyGram's attempt to locate the appropriate analysis, and the concomitant burden of proof, by reference to the vestigial line separating *per se* analysis from the rule of reason.").

[128] The author's research has disclosed only four cases meeting this criteria (five, if one is inclined to include *Polygram*). *See* note 127 above. Perhaps there are others—though the underlying research was extensive, it was not comprehensive. But the basic point holds. The number of cases where quick look has been litigated far exceeds then number of cases where application of quick look affected the outcome.

[129] *Smart*, 2023 WL 4827366, at *7, citing NCAA v. Alston, 594 U.S. 69, 90–91 (2021); *Law*, 134 F.3d at 1020; and *Agnew*, 683 F.3d at 336.

[130] *E.g. Alston*, 594 U.S. at 87–91; *Worldwide Basketball*, 388 F.3d at 961; *In re* NCAA Athletic Grant-in-Aid Cap Antitrust Litig., 375 F. Supp. 3d 1058 (N.D. Cal. 2019), *aff'd sub nom Alston*, 594 U.S. at 107; O'Bannon v. NCAA, 7 F. Supp. 3d 955, 985 (N.D. Cal. 2014), *aff'd in relevant part, vacated in part*, 802 F.3d 1049 (9th Cir. 2015); Metropolitan Intercollegiate Basketball Ass'n n. NCAA, 337 F. Supp. 2d 563, 572-73 (S.D. N.Y. 2004). *See also* Agnew v. NCAA, No. 1:11-cv-0293, 2011 WL 3878200, *5 (June 18, 2012) (rejecting use of quick-look standard), *aff'd* 638 F.3d 328 (using quick-look analysis but nonetheless affirming dismissal of complaint for failure to plead a cognizable market).

There is a similar split regarding so-called "no poach" or "no hire" restraints—alleged agreements between companies not to hire each other's employees. In *Deslandes*,[131] the district court applied the quick-look methodology in denying a motion to dismiss, and *Yi*[132] relied on this decision in coming to a similar conclusion. But the *Deslandes* judge later changed his mind (after discovery and class certification proceedings gave him more familiarity with the subject)[133] and this later analysis was deemed the more persuasive in Giordano v. Saks Inc., 654 F. Supp. 3d 174, 203–04 (E.D.N.Y. 2023).[134]

The courts' inconsistency is not just a matter of judges coming to different conclusions regarding similar facts. There is also disarray in the underlying doctrine.

The Supreme Court has held that the *per se* rules apply only to horizontal restraints, not to vertical ones.[135] Can restraints that combine both horizontal and vertical elements, though outside the scope of the *per se* rule, be condemned after only a quick look? The Third Circuit

[131] Deslandes v. McDonald's USA, LLC, No. 17-C-04857, 2018 WL 3105955, *7, *8–9 (N.D. Ill. June 25, 2018).

[132] *Yi*, 2018 WL 8918587, at *5.

[133] Deslandes v. McDonald's USA, LLC, No. 17-C-04857, 2022 WL 2316187, at *2, *4 (N.D. Ill. June 28, 2022). On appeal, the Seventh Circuit agreed that a "quick-look analysis . . . is out," but vacated and remanded the case for further consideration of *per se* condemnation. Deslandes v. McDonald's USA, LLC, 81 F. 4th 699, 703, 705 (7th Cir. 2023).

[134] *See also* Aya Healthcare Servs., Inc. v. AMN Healthcare, Inc., 9 F. 4th 1102, 1110, 1113 n.6 (9th Cir. 2021) (finding *per se* rule inapplicable where no-solicitation agreement is ancillary to a procompetitive collaboration, and further holding that "'[b]ecause *per se* liability is unwarranted here,' the quick-look standard is also inapplicable."), quoting Texaco Inc. v. Dagher, 547 U.S. 1, 7 n.3 (2006); Ogden v. Little Caeser Ents., Inc., 393 F. Supp. 3d 622, 636, 640 (E.D. Mich. 2019) (granting motion to dismiss, and rejecting quick-look claim regarding a "no poaching" agreement).

[135] *See* Ohio v. Am. Express Co., 585 U.S. 529, 540–41 (2018) ("Typically only 'horizontal' restraints—restraints 'imposed by agreement between competitors'—qualify as unreasonable *per se*."). *See also* Gordon v. Lewistown Hosp., 423 F.3d 184, 210 (3d Cir. 2005) (quick look cannot be applied to non-price vertical restraints).

said "no" in *Winn-Dixie*,[136] but the Sixth Circuit said "yes" (or at least "maybe") in *Southeastern Milk*.[137]

Is proof of market power required? The Seventh Circuit is on both sides of this issue. In *Agnew*, it stated that "no market power analysis is necessary" in a quick-look case, unless the defendant proffers a justification for its conduct.[138] But just last year, in *Deslandes*, the Seventh Circuit explained that "[m]arket power is essential to any claim under the Rule of Reason."[139] Thus in the absence of plausible allegations of market power, "the Rule of Reason is out of this suit, and, as quick-look analysis is part of the Rule of Reason, it is out too."[140]

What about market definition? This time it is the Sixth Circuit that is on both sides of the issue. In *Southeastern Milk*, it held that "[u]nder a quick-look analysis, the Plaintiffs do not necessarily need to establish either product or geographic market evidence . . . ."[141] But the Sixth Circuit's opinion in *Worldwide Basketball* is one of four appellate decisions holding that a quick look "will not suffice" where "the precise product market is neither obvious nor undisputed."[142]

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[136] Winn-Dixie Stores, Inc. v. E. Mushroom Mktg. Coop., Inc., 89 F. 4th 430, 439–44 (3d Cir. 2023).

[137] *In re* Se. Milk Antitrust Litig., 739 F.3d 262, 274–75, 286 (6th Cir, 2014) (reversing summary judgment, and remanding so that district court could reconsider whether to use quick look).

[138] Agnew v. NCAA 683 F.3d 328, 336 (7th Cir. 2012)

[139] Deslandes v. McDonald's USA, LLC, 81 F. 4th 699, 702 (7th Cir. 2023).

[140] *Id.* at 703.

[141] *Southeast Milk*, 739 F.3d at 275–76. *See also* N. Tex. Specialty Physicians v. FTC, 528 F.3d 346, 362, 370 (5th Cir. 2008) (FTC condemnation of restraint deemed "inherently suspect" affirmed even though FTC did not define relevant markets); Law v. NCAA, 134 F.3d 1010, 1020 (10th Cir. 1998) (holding, that "determination of the relevant market" is not necessary where a quick-look analysis is appropriate, and where undisputed evidence shows an impact on prices); Chi. Pro. Sports Ltd. P'ship v. NBA, 961 F.2d 667, 676 (7th Cir. 1992) ("the failure of [the defendant's] justifications eliminates the need for the district court to define a market").

[142] Worldwide Basketball & Sport Tours, Inc. v. NCAA, 388 F.3d 955, 961 (6th Cir. 2004); *accord* Buccaneer Energy (USA) v. Gunnison Energy Corp., 846 F.3d 1297, 1312 n.17 (10th Cir. 2017) ("here the relevant market is not readily apparent and the Plaintiffs have failed to adequately define a relevant market, thereby making it impossible to assess the effect of [the challenged practice] on customers rather than merely on competitors") (citation omitted); *Agnew*, 683 F.3d at 345–46; Deutscher Tennis Bund v. ATP Tour, Inc., 610 F.3d 820, 832 (3d Cir. 2010) ("Because 'the contours of the market' here are not 'sufficiently well known or defined to permit the court to ascertain without the aid of extensive market analysis whether the challenged practice impairs competition,' 'quick

D. There Is No Cogent Test for When "Quick Look" Should Apply

After decades of quick-look caselaw there is still no concrete test in place that trial courts can apply to the facts before them. In 2023, after trying to summarize the applicable test, the Third Circuit threw up its hands:

> If this sounds like a test of 'I know it when I see it,' that is not far from the mark. There is no set methodology for determining when the quick look applies, . . .[143]

It wasn't lack of diligence that led the Third Circuit to give up on articulating a usable standard. The Supreme Court warned us 25 years ago that such a standard does not exist: "there is generally no categorical line to be drawn between restraints that give rise to an intuitively obvious inference of anticompetitive effect and those that call for more detailed treatment."[144] "The truth is that our categories of analysis of anticompetitive effect are less fixed than terms like '*per se*,' 'quick look,' and 'rule of reason' tend to make them appear."[145]

So how can the lower courts know when they are supposed to conduct only a quick look? They can't. "The boundaries between these levels of analysis are fluid; . . ."[146] "[T]he three methods are best viewed as a continuum, on which the amount and range of information needed to evaluate a restraint varies depending on how highly suspicious and how unique the restraint is."[147]

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look' is not appropriate and proof of relevant market is required under the full-scale rule of reason.") (citation omitted).

See also In re Local TV Advert. Antitrust Litig., No. 18-C-06785, 2020 WL 6557665, *11 (N.D. Ill. Nov. 6, 2020) ("The failure to allege the existence of a relevant commercial market is fatal to a Sherman Act claim, regardless of whether the Court applies a *per se* analysis, quick-look review, or rule-of-reason analysis.").

[143] Winn-Dixie Stores, Inc. v. E. Mushroom Mktg. Coop., Inc., 89 F. 4th 430, 439 (3d Cir. 2023).

[144] Cal. Dental Ass'n v. FTC, 526 U.S. 756, 780–81 (1999).

[145] *Id.* at 789; *accord id.* ("there is often no bright line separating *per se* from Rule of Reason analysis"); *see also* Polygram Holding, Inc. v. FTC, 416 F.3d 29, 36 (D.C. Cir. 2005).

[146] Cont'l Airlines, Inc. v. United Airlines, Inc., 277 F.3d 499, 509 (4th Cir. 2002).

[147] *Id.* (citation omitted).

But *California Dental* (and other Supreme Court cases) provide contradictory signals. Despite the above language indicating that line-drawing is not really possible, other language from the Court appears to set out the line. For example, in *Actavis*, the Court held that "abandonment of the 'rule of reason' in favor of presumptive rules (or a 'quick-look' approach) is appropriate only where 'an observer with even a rudimentary understanding of economics could conclude that the arrangements in question would have an anticompetitive effect on customers and markets."[148] This observation led some courts to hold that quick look applies where anticompetitive effects are obvious to a person with "a rudimentary understanding of economics."[149]

The "rudimentary understanding" test runs into an immediate problem: judges are not economists. One does not need to have received any training in economics to graduate from Harvard Law School,[150] to be rated as "Well Qualified" for a judgeship by the ABA,[151] or to be nominated and confirmed.[152] As a result, there are many very accomplished judges who themselves do not have "even a rudimentary understanding of economics."

And the defendants in quick-look cases are unlikely to go quietly. They will proffer expert testimony that the challenged restraint is not likely to have anticompetitive effects. True,

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[148] FTC v. Actavis, Inc., 570 U.S. 136, 159 (2013), quoting *Cal. Dental*, 526 U.S. at 770. *Accord* California *ex rel.* Harris v. Safeway, Inc., 651 F.3d 1118, 1138 (9th Cir. 2011).

[149] *See*, *e.g.*, 1-800 Contacts, Inc. v. FTC, 1 F. 4th 102, 115 (2d Cir. 2021) (citation omitted).; Procaps S.A. v. Patheon, Inc., 845 F.3d 1072, 1084 n.3 (11th Cir. 2016) (rejecting the quick look doctrine because the "effects of the arrangements in this case are far from readily apparent").

[150] *See* Harv. Law School, *J.D. Degree Requirements Quick Reference Guide*, HARV. UNIV. https://hls.harvard.edu/academics/curriculum/registration-information/j-d-degree-requirements-quick-reference-guide/ (last visited May 14, 2024).

[151] *See* Am. Bar Ass'n Standing Comm. on the Fed. Judiciary, *What It Is and How It Works*, AM. BAR ASS'N (Aug. 2023), www.americanbar.org/content/dam/aba/administrative/government_affairs_office/fjc-backgrounder.pdf (last visited May 14, 2024), at 6.

[152] *See* U.S. CONST. art. II, § 2.

judges and juries are often called upon to sort through complex, technical, disputed expert evidence. But where both parties proffer admissible, material expert testimony, determining who has the better of the argument is usually the province of the trier of fact, following presentation of both sides' evidence at trial.

So how can non-economist judges determine, as a matter of law, that the opinion of a defendant's expert economist is contrary to what would be obvious to anyone with a "rudimentary understanding of economics?" As a practical matter, since judges are not equipped to make such determinations, they usually do not. Even when they have "strong doubts" about the defenses presented, many judges do not view their economic prowess as deep enough to allow them to pass judgment based upon a quick look at an undeveloped record.[153] The Second Circuit explained that even a thorough review of a plaintiff's economic evidence did not give them the confidence necessary to reject the defendant's position as a matter of law:

> [T]he fact that it required the testimony of expert witnesses who provided empirical analyses in order to determine the net competitive effect of the Challenged Agreements underscores the point: these restraints are not obviously anticompetitive to someone with only a rudimentary understanding of economics.[154]

The Supreme Court also instructed courts to "take special care not to deploy these condemnatory tools [*per se* or quick look] until we have amassed considerable experience with the type of restraint at issue and can predict with confidence that it would be invalidated in all or

[153] *See*, *e.g.*, *Safeway*, 651 F.3d at 1139 (Fisher, J., specially concurring).

[154] 1-800 Contacts, Inc. v. FTC, 1 F. 4th 102, 117 n.7 (2d Cir. 2021).

almost all instances."[155] The "considerable experience" formulation creates another oft-used justification for rejecting quick-look claims.[156]

Further, any attempt to use the "considerable experience" standard to justify the use of quick look runs into the same problem as the "rudimentary understanding" test: judges are not economists. Certainly, a judge can review record evidence and catalogue which economic facts do, and do not, correlate with facts from prior judicial opinions. But determining whether the differences are material is primarily an economic question, not a legal one. So before adopting a quick-look approach, non-economist judges need to decide, as a matter of law and notwithstanding the testimony of the defendant's expert economist, that the differences in the fact pattern are immaterial to the restraint's effect on the market. A standard that cannot be applied by judges who lack economic expertise is not a standard that provides meaningful guidance to the courts.

E. The Quick-Look Methodology Neither Shortens Discovery Nor Streamlines the Issues in Dispute

Antitrust cases are notoriously slow and expensive. The Supreme Court has noted "the unusually high cost of discovery in antitrust cases."[157] Indeed, the Court's insistence that complaints set out "plausible" claims is grounded in the need to avoid such costs "when there is no reasonable likelihood that the plaintiffs can construct a claim from the events related in the

[155] NCAA v. Alston, 594 U.S. 69, 89 (2021)(citations omitted). *Accord* Winn-Dixie Stores, Inc. v. E. Mushroom Mktg. Coop., Inc., 89 F. 4th 430, 439 (3d Cir. 2023); *see also id.* ("[I]t does not apply if 'the contours of the market are not sufficiently well known or defined to permit the court to ascertain without the aid of extensive market analysis whether the challenged practice impairs competition'" (quoting Deutscher Tennis Bund v. ATP Tour, Inc., 610 F.3d 820, 832 (3d Cir. 2010)).

[156] *See*, *e.g.*, *1-800 Contacts*, 1 F. 4th at 116 ("Courts do not have sufficient experience with this type of conduct to permit the [FTC's] abbreviated analysis" to stand); *Safeway*, 651 F.3d at 1139 ("Given the limited judicial experience with revenue sharing for several months pending a labor dispute, we cannot say that the restraint's anticompetitive effects are 'obvious' under a per se or quick-look approach.").

[157] Bell Atl. Corp. v. Twombly, 550 U.S. 544, 558 (2007) (citations omitted).

complaint."[158] There is, therefore, a natural temptation to somehow make antitrust cases less complicated, to find a way to avoid the fact-intensive market analysis often required by the rule of reason. The quick-look methodology, however, fails to accomplish this.

The quick-look doctrine does nothing to streamline discovery. At the motion-to-dismiss stage, most judges are reluctant to rule on whether quick look is applicable. Unless such a determination is dispositive of the case, district courts generally take the view that "[w]hether quick-look or rule of reason is the applicable framework is an inquiry more appropriate for the summary judgment phase."[159]

Thus, even after litigants take the trouble to file preliminary motions on the applicability of quick look, the parties will usually head into discovery with that question unresolved. And where "the Court punted when asked whether the … 'quick-look' approach applies," the "prudent" approach is for the parties to commission expensive expert reports on market conditions.[160]

It is equally prudent for the parties to develop robust evidence even where the court rules that the complaint states a claim under a quick-look theory. As one court put it: "The Court's analysis only determines whether Plaintiffs have sufficiently alleged their Sherman Act Section 1 claims, not which standard should control following discovery."[161] Thus, even where "the Court

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[158] *Id.*

[159] Brown v. Amazon.com, Inc., No. 22-00965, 2023 WL 5793303, *5 n.3 (W.D. Wash. Sept. 7, 2023). *Accord*, *e.g.*, Batton v. Nat'l Ass'n of Realtors, No. 21-CV-00430, 2024 WL 689989, *5 (N.D. Ill. Feb. 20, 2024) ("While Plaintiffs contend that their allegations satisfy all three methods of analysis, the Court does not believe it appropriate to decide conclusively at this early stage which mode of analysis applies."); Staley v. Gilead Scis., Inc., No. 19-CV-02573, 2020 WL 5507555, *19 (N.D. Cal. July 29, 2020) (declining to rule on whether the rule of reason, per se illegal rule, or the quick-look rule is applicable).

[160] Conrad v. Jimmy John's Franchise, LLC, No. 18-CV-00133, 2021 WL 718320, *22 (S.D. Ill. Feb. 24, 2021).

[161] *In re* RealPage, Inc., Rental Software Antitrust Litig. (No. II), No. 23-MD-03071, 2023 WL 9004806, *22 (M.D. Tenn. Dec. 28, 2023).

has concluded that plaintiff has stated a claim for a restraint that might be unlawful under quick-look analysis, the evidence at a later stage may not support it."[162] Determination of whether quick look applies may be a question of law, but "underpinning that purely legal decision are numerous factual questions."[163] Parties therefore head into discovery with every incentive to develop thorough economic evidence.

Furthermore, whether or not the *plaintiffs* want to develop a robust record, they cannot stop the defendants from doing so. "[E]ven where anticompetitive effects are obvious, 'quick look' condemnation is proper only after assessing and rejecting the logic of proffered procompetitive justifications."[164] Defendants therefore have the right to develop and proffer evidence of cognizable justifications. Similarly, as noted above, courts usually reject quick-look analysis where defendants present *bona fide* disputes regarding the market definition.[165]

In short, courts do not use the quick-look doctrine to prevent defendants from defending themselves; rather, application of the doctrine reflects a considered determination that the proffered defenses are not cognizable, are not proven by the evidence, or are otherwise implausible. "Quick-look analysis is not a tool for cutting corners."[166]

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[162] Deslandes v. McDonald's USA, LLC, No. 17-C-04857, 2018 WL 3105955, *8 (N.D. Ill. June 25, 2018).. And indeed, according to the same judge and the Seventh Circuit, in the end, the evidence did not support a quick-look analysis. *See* Deslandes v. McDonald's USA, LLC, 81 F. 4th 699, 703 (7th Cir. 2023).. *See also* Yi v. SK Bakeries, LLC, No. 18-05627, 2018 WL 8918587, *5 (W.D. Wash. Nov. 13, 2018) (although the complaint plausibly stated a quick-look claim, "Defendants' justifications for the [restraint] may carry weight at other stages in the litigation").

[163] Winn-Dixie Stores, Inc. v. E. Mushroom Mktg. Coop., Inc., 89 F. 4th 430, 438 (3d Cir. 2023) (citation omitted).

[164] Deutscher Tennis Bund v. ATP Tour, Inc., 610 F.3d 820, 832 (3d Cir. 2010).

[165] *See* Buccaneer Energy (USA) v. Gunnison Energy Corp., 846 F.3d 1297, 1312 n.17 (10th Cir. 2017) ; Agnew v. NCAA 683 F.3d 328, 345–46 (7th Cir. 2012); *Deutscher*, 610 F.3d at 832; Worldwide Basketball & Sport Tours, Inc. v. NCAA, 388 F.3d 955, 961 (6th Cir. 2004).

[166] United States v. Apple, Inc., 791 F.3d 290, 349 (2d Cir. 2015) (Jacobs, J., dissenting).

In addition, antitrust cases engender numerous disputes that are not simplified through any version of the quick-look doctrine. Plaintiffs who seek class certification must still make a factual showing that they have satisfied all the prerequisites.[167] A finding that the complaint states a quick-look claim does not guarantee class certification, particularly where the defendant proffers evidence that market conditions vary across the class.[168]

Nor does the quick-look rule relieve plaintiffs of their obligation to provide proof of antitrust injury, which is required even where a *per se* violation is established.[169] And there is no suggestion in the caselaw that use of the quick-look standard moots the need to show causation or the amount of damages suffered.

F. Battles Over the Mode of Analysis Waste Time and Resources, and Create Uncertainty and Fragile Judgments

The apparent availability of quick look is an attractive nuisance. It creates another issue for the parties to fight about, but the endless squabbling over the applicability of quick look is almost never productive.

The potential for summary condemnation creates a significant incentive for plaintiffs to raise the quick-look issue, and for defendants to resist it. And the vagueness and inconsistency of the doctrine will often give both parties the ability to raise colorable arguments. Determining the applicability of quick look is, after all, "more 'art than science,' and not subject to 'an overly-

[167] *See* Wal-Mart Stores, Inc. v. Dukes, 564 U.S. 338, 350–51 (2011).

[168] *See* Deslandes v. McDonald's USA, LLC, No. 17-C-04857, 2021 WL 3187668, *11–13 (N.D. Ill. July 28, 2021) (denying class certification despite having ruled that the complaint stated a quick-look claim because, among other reasons, multiple geographic markets were at issue and proving an anticompetitive effect in each is not a common question).

[169] *See* Atl. Richfield Co. v. USA Petroleum Co., 495 U.S. 328, 344 (1990); *see also* Brentwood Acad. v. Tenn. Secondary Schs. Athletic Ass'n, No. 97-01249, 2008 WL 2811307, *5 (M.D. Tenn. July 18, 2008) (summary judgment granted on quick-look claim due to plaintiff's failure to show antitrust injury).

formalistic and literal approach.'"[170] Given the lack of any concrete test to apply, plaintiffs can always hope that the judge's sense of the "art" of antitrust analysis favors them.

But should the plaintiff win a quick-look claim, the defendant can seek *de novo* review from the court of appeals. "The selection of a mode of antitrust analysis is a question of law over which [appellate courts] exercise plenary review."[171] So the appellate judges will determine the issue through their own sense of the "art" of antitrust analysis, with no deference to the trial court.

Very few district court judgments have depended upon application of quick look, and perhaps most of these judgments have been reversed.[172] In administrative proceedings, a number of FTC decisions applied the "inherently suspect" test, which (as noted above) is a close cousin to the quick-look test. In five appeals of such cases, the use of quick-look was rejected twice[173] and affirmed twice,[174] and in one case the FTC was affirmed on alternative grounds.[175] Given this track record, defendants who lose on a quick-look analysis at the trial court, or before the FTC, can be optimistic on appeal.

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[170] Winn-Dixie Stores, Inc. v. E. Mushroom Mktg. Coop., Inc., 89 F. 4th 430, 439 (3d Cir. 2023) (citation omitted).

[171] Deutscher Tennis Bund v. ATP Tour, Inc., 610 F.3d 820, 829 n.7 (3d Cir. 2010). *Accord Winn-Dixie*, 89 F. 4th at 438 (same); *see also In re Wholesale Grocery Prods. Antitrust Litig.*, 752 F.3d 728, 733–34 (8th Cir. 2014) (same, in context of choice between rule-of-reason and *per se*).

[172] *See* Cont'l Airlines, Inc. v. United Airlines, Inc., 277 F.3d 499, 517 (4th Cir. 2002); Worldwide Basketball & Sport Tours, Inc. v. NCAA, 388 F.3d 955, 961 (6th Cir. 2004); United States v. Brown Univ., 5 F.3d 658, 664, 679 (3d Cir. 1993). *But see* Law v. NCAA, 134 F.3d 1010, 1012 (10th Cir. 1998) (affirming quick-look win).

[173] *See* Cal. Dental Ass'n v. FTC, 526 U.S. 756 (1999); 1-800 Contacts, Inc. v. FTC, 1 F. 4th 102, 116 (2d Cir. 2021).

[174] *See* N. Tex. Specialty Physicians v. FTC, 528 F.3d 346, 370 (5th Cir. 2008); Polygram Holding, Inc. v. FTC, 416 F.3d 29, 29 (D.C. Cir. 2005).

[175] *See* Realcomp II, Ltd. v. FTC, 635 F.3d 815, 826 (6th Cir. 2011) (affirming FTC based on rule-of-reason analysis; explicitly not "reaching the question of whether to apply quick-look analysis."). The FTC also won in FTC v. Ind. Fed'n of Dentists, 476 U.S. 447 (1986). However, the underlying opinion of the Commissioners applied only the rule of reason. *See In re* Ind. Fed'n of Dentists, 101 F.T.C. 57, 73 (1983).

Unsuccessful plaintiffs can also appeal. For them too, the courts of appeal will apply an ambiguous legal test without deference to the trial court's decision. In practice, these attempts to obtain quick-look condemnation have been futile, and can drag out the proceedings.

In *Safeway*, for example, the plaintiffs—rebuffed by the district court—won a temporary victory before a panel of the Ninth Circuit. The panel ruled that the restraint in question could be condemned based on a quick look.[176] But when sitting *en banc*, the Ninth Circuit disagreed with the panel and restored the district court's judgment for the defendants.[177] Similarly, in *Southeastern Milk*, the Sixth Circuit reversed a grant of summary judgment, instructing the district court to determine whether a quick-look analysis would be appropriate.[178] On remand, the district court rejected quick look and mandated "a full rule of reason analysis."[179]

The *Chicago Professional Sports* cases provide yet another example of how efforts to apply the quick-look rule led to inconsistent results and an immense waste of time. In the first appellate opinion in this controversy, although affirming a quick-look judgment for the plaintiffs, the Seventh Circuit chided the district court judge for moving the case to trial "like greased lightning."[180] The judgment would likely have been reversed if the defendant had properly preserved an objection on that point.[181] On remand (there were several unresolved issues), the district court judge apparently took the Seventh Circuit's criticism to heart. Although the judge

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[176] California *ex rel.* Brown v. Safeway, Inc., 615 F.3d 1171, 1203 (9th Cir. 2010).

[177] California *ex rel.* Harris v. Safeway, Inc., 651 F.3d 1118, 1119, (9th Cir. 2011).

[178] *In re* Se. Milk Antitrust Litig., 739 F.3d 262, 274–75 (6th Cir, 2014).

[179] Food Lion, LLC v. Dean Foods Co., No. 07-CV-00188, 2016 WL 1259959, *1 (E.D. Tenn. Mar. 30, 2016). The appeal as a whole, however, was a success. The Sixth Circuit reversed the exclusion of expert testimony and, with the aid of that testimony, the plaintiffs were able to define the relevant geographic market and withstand the motion for summary judgment. *See Se. Milk*, 739 F.3d 262, 262–63.

[180] Chi. Pro. Sports Ltd. P'ship v. NBA, 961 F.2d 667, 676–77 (7th Cir. 1992).

[181] *See id.*

continued to adhere to the quick-look approach, the remand proceedings consumed over three years, culminating in a nine-week trial, more than 1400 exhibits, 481 stipulations of fact, lengthy submissions, and a thorough opinion that granted an injunction to the plaintiffs.[182]

The defendants' appeal of this second judgment was heard by the same panel of judges as the prior appeal, and the same judge wrote both opinions. But the second time around the Seventh Circuit held (contrary to its prior opinion) that the factual record did *not* support the use of the quick-look methodology. The challenged conduct "may not be condemned without analysis under the full Rule of Reason."[183] The case was then remanded for further proceedings, "[w]ith apologies to both sides" for making them "suffer through still more litigation."[184]

V. THE "QUICK LOOK" DOCTRINE IS UNFIXABLE

A. The Fundamental Problem with Quick Look Cannot Be Fixed

Perhaps *some* of the problems outlined above have solutions. Perhaps, with enough time and focused attention, the conflicting holdings could be addressed and ironed out. But one fact will not change: judges are not economists.

Quick look is predicated on the notion that some restraints, though not *per se* illegal, are so obviously pernicious that anticompetitive effects can be presumed and need not be proven. But what might be obvious to a learned economist might not be so obvious to a generalist judge who has no particular economic training.

Judges, on the whole, are well aware of the limits of their expertise. So long as judges remain cautious about their abilities to evaluate highly complex economic evidence, the pattern that we have seen over the past decades will repeat. Judges will decline to treat anticompetitive

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[182] *See* Chi. Pro. Sports Ltd. P'ship v. NBA, 874 F. Supp. 844, 846, 850, 858–62 (N.D. Ill. 1995).

[183] *See* Chi. Pro. Sports Ltd. P'ship v. NBA, 95 F.3d 593, 600 (7th Cir. 1996).

[184] *Id.* at 595.

effect as an issue to be presumed as a matter a law; they will instead, in almost all cases, reject quick look and call for an evidence-based rule-of-reason inquiry.

This cautious, evidence-based inquiry is the optimistic scenario. Doubling down on quick-look presumptions would be worse, as shown by the history of the *per se* rules outlined in Section II(B) above. For decades, until the 1970s, judges worked to expand the *per se* categories, dabbling as amateur economists. They weren't very good at it. What they eventually learned is that "rules that seek to embody every economic complexity and qualification may well, through the vagaries of administration, prove counter-productive, undercutting the very economic ends they seek to serve."[185] Eventually, the Supreme Court had to overrule or severely weaken numerous *per se* decisions, recognizing that the prior courts had badly overestimated their ability to predict when business arrangements would necessarily harm competition.

B. What Kind of Case Would We Want to Save Through Quick-Look Analysis?

If the quick-look methodology is simply abandoned, as this article proposes, what would we lose? Not much. Dumping quick look would not change the outcome of more than a handful of marginal cases.

The experience of the past decades has failed to disclose any genre of cases that are good candidates for quick look. There is no such thing as a typical quick-look case, or a common fact pattern that the courts have settled on as warranting quick-look review. As discussed above, there is only a handful of one-off cases where application of quick look made a difference.
The only discernible common thread among these cases is that quick look matters most where the plaintiff's prima facia case is weak, but the defenses are even weaker. These cases include *Polygram*, where the restraint could not have affected more than a negligible volume of

[185] NCAA v. Alston, 594 U.S. 69, 99 (2021) (citation omitted).

commerce,[186] and *North Texas Specialty Physicians*, where the evidence showed that the challenged restraint—arrangements designed to increase the bargaining power of certain doctors—did not in fact increase prices.[187]

The ad hoc nature of the quick-look cases should be no surprise given the ambiguity of the underlying standard and the peculiar niche that quick look is intended to occupy. The quick-look methodology can only affect the outcome where the theoretical underpinnings of the plaintiff's case do not trigger the *per se* rules and the plaintiff's empirical evidence is too scant to survive an analysis under the rule of reason. Even in these cases, as discussed above, courts revert to using the rule of reason if the defendant is able to proffer a plausible justification,[188] or if market definition is in dispute.[189]

Given time and effort, perhaps the courts could turn these outliers into a genre of cases: cases where the restraints resemble (but are not) *per se* violations, where the defendant cannot justify the restraints, but where there is little to no evidence of any effect on competition. There is no consensus, however, that such marginal cases are worth saving, through a quick-look methodology or otherwise.

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[186] Two record companies agreed to produce an album by the "Three Tenors," who were superstars of the classical opera world. The challenged restraint was an alleged agreement to refrain from advertising and discounting, for a ten-week period, two earlier recordings featuring the same artists. *See* Polygram Holding, Inc. v. FTC, 416 F.3d 29, 32 (D.C. Cir. 2005). Thus the only alleged anticompetitive effect involved short-term restrictions on the pricing and promotion of two albums that were at all times available for purchase.

[187] An association representing Texas doctors engaged in non-exclusive negotiations on their behalf with insurance companies and other payors. The association also gathered and disseminated related pricing information. The FTC and Fifth Circuit opined that "some of [these] practices bear a very close resemblance to horizontal price-fixing, . . ." N. Tex. Specialty Physicians v. FTC, 528 F.3d 346, 362, 367 (5th Cir. 2008). Anticompetitive effects were presumed, even though the FTC and its Administrative Law Judge "found that [defendant] did not receive higher rates than those that other physicians and physician groups were already receiving." *Id.* at 367.

[188] *See*, *e.g.*, Cal. Dental Ass'n v. FTC, 526 U.S. 756, 770 (1999).

[189] *See* Buccaneer Energy (USA) v. Gunnison Energy Corp., 846 F.3d 1297, 1312 n.17 (10th Cir. 2017) ; Agnew v. NCAA 683 F.3d 328, 345–46 (7th Cir. 2012); Deutscher Tennis Bund v. ATP Tour, Inc., 610 F.3d 820, 832 (3d Cir. 2010); Worldwide Basketball & Sport Tours, Inc. v. NCAA, 388 F.3d 955, 961 (6th Cir. 2004).

Just the opposite. Quick look is not appropriate where the challenged restraint "might have no effect at all on competitiveness …."[190] The Supreme Court tells us that "attempts to meter small deviations is not an appropriate antitrust function."[191] This is because "mistaken condemnations of legitimate business arrangements are especially costly, because they chill the very procompetitive conduct the antitrust laws are designed to protect."[192] Indeed, "some restraints may be so obviously incapable of harming competition that they require little scrutiny," such as a joint venture that controls only a tiny portion of the relevant market.[193]

Perhaps the FTC would have prevailed in *Polygram* and *North Texas* even if the quick look and its variants did not exist, and the FTC's evidence had been evaluated under the rule of reason. If so, the quick look and "inherently suspect" doctrines served no purpose, and merely complicated the proceedings by inducing the parties to repeatedly brief the applicability and consequence of those doctrines. Maybe the defendants would have prevailed, and quick look really did make a difference to the outcome. But why should we want to keep alive an entire doctrine, along with its complications and controversies, just to encourage a handful of weak cases?

Put simply, the juice isn't worth the squeeze.

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[190] *Cal. Dental*, 526 U.S. at 778; *accord* Cont'l Airlines, Inc. v. United Airlines, Inc., 277 F.3d 499, 514 (4th Cir. 2002).

[191] *Alston*, 594 U.S. at 99 (citation omitted); *see also* Ohio v. Am. Express Co., 585 U.S. 529, 541 (2018) (in a rule-of-reason case, "the plaintiff has the initial burden to prove that the challenged restraint has a ***substantial*** anticompetitive effect") (emphasis added).

[192] *Alston*, 594 U.S. at 99 (quotation marks and citation omitted).

[193] *Id.* at 88–89.

VI. CONCLUSION—THE TWINKLING OF THE SUPREME COURT'S EYE, AND A PATH FORWARD

Sometimes even antitrust cases, the Supreme Court tells us, can be resolved in "the twinkling of an eye." They must mean this since they have said so at least four times.[194] But there is far less to this statement than meets the eye. Largely, all this "twinkling" reflects the fact that the job of a Supreme Court justice is very different from the job of a trial court judge.

The two "twinkling" cases where the Court actually condemned a restraint—*Alston* and *Board of Regents*—must have seemed straightforward to the justices. In both cases, they were presented with unchallenged findings establishing horizontal pricing agreements, monopoly power in well-defined markets, and adverse effects on both prices and output.[195] Upon ruling that the defendants' justifications were non-cognizable (or contrary to well-supported factual findings), the justices joined the lower courts in unanimously condemning the challenged agreements.

From these poor primers, too many have taken the wrong lesson. The quick-look doctrine comes from the assumption that what was easy for the Supreme Court should not be hard for anyone else. But *Alston* and *Board of Regents* were easy for the Supreme Court because of all the hard work that had come before. In those cases, the district courts had made comprehensive findings by applying a full rule-of-reason analysis to an extensive trial record.[196] In the "twinkling" cases where the lower courts (or FTC commissioners) did not fully analyze market

[194] *See id.* at 88; Am. Needle, Inc. v. NFL, 560 U.S. 183, 203 (2010) ; *Cal. Dental*, 526 U.S. at 763; NCAA v. Bd. of Regents of Univ. of Okla., 468 U.S. 85, 109 n.39 (1984).

[195] *Alston*, 594 U.S. at 86; *accord Board of Regents*, 468 U.S. at 103–06.

[196] *See NCAA Athletic Grant-in-Aid Cap Antitrust Litig.*, 375 F. Supp. 3d 1058; *Board of Regents*, 546 F. Supp. 1276.

conditions, the Supreme Court was unable to decide who should win the case, and instead had to remand for further proceedings.[197]

Decades of experimentation have failed to yield a formula that allows trial courts to bypass the cumbersome aspects of antitrust litigation, and jump straight to a quick-look condemnation. Quick look has instead been a distraction; endless wrangling over a methodology that is seldom used and that almost never alters the outcome.

Perhaps something can be salvaged from this failed experiment, but only if we start asking better questions. As discussed above, quick look comes closest to being relevant where (1) there is a theoretical basis for inferring anticompetitive effect from the nature of the constraint, (2) the plaintiff's real-world proof of actual effect is weak, and (3) the defendant's defenses are even weaker. Quick look poses the question of whether these factual circumstances trigger, as a matter of law, legal presumptions of effect or other departures from the rule of reason. This inquiry has proven to be a dead end. We should stop asking this question, and remove the phrase "quick look" from our antitrust vocabulary.

Start instead with the rule of reason, and the step-one requirement that the plaintiff prove "that the challenged restraint has a substantial anticompetitive effect that harms consumers in the relevant market."[198] From here, the question is what evidence suffices to satisfy this showing, particularly where the plaintiff has strong theoretical evidence based on the nature of the restraint (with "strong theoretical evidence" meaning actual evidence, such as from an expert, and not lawyer argument or an attempt to tease economic rules from legal precedent). Where such strong

[197] *See Cal. Dental*, 526 U.S. at 780–81 (vacating judgment for FTC and remanding for a rule-of-reason analysis); *see also* FTC v. Actavis, Inc., 570 U.S. 136, 160 (2013) (reversing dismissal of complaint and remanding for a rule-of-reason analysis).

[198] *American Express*, 585 U.S. at 541.

theoretical evidence is present, productive questions include: What additional evidence is necessary for plaintiff to meet its step-one burden? How precise must a plaintiff's market definition be when the defendant is unable to provide evidence that would support a competing definition? How much empirical evidence of anticompetitive effect is needed where the constraint serves no apparent purpose other than creating the alleged effect?

These are not easy questions. Outside of the *per se* categories, the courts may need to find answers on a case-by-case basis. But instead of presiding over sterile debates regarding presumptions and whether the potential for pernicious effects is "obvious," courts will at least be focusing on the "essential inquiry"—"whether or not the challenged restraint enhances competition."[199]

[199] *California Dental*, 526 U.S. at 779-80.