Epic Games Played by the Rule of Reason: Rebalancing Antitrust's Improbable Standard

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When mobile app developers like Epic Games—creator of the massively popular online video game Fortnite*—make their product available on Apple's App Store, they enter the "walled garden," a closed digital ecosystem wherein iPhone and iPad users cannot download games through other digital marketplaces. They also agree to Apple's "antisteering" provision: developers cannot attempt to steer consumers away from the App Store to purchase the same game on the developer's website, often for lower prices. In 2023, the Ninth Circuit held in* Epic Games v. Apple *that antitrust challenges to digital download tying arrangements like these should be judged under the defendant-friendly rule of reason standard, rather than by categorical presumptions. Though Apple ultimately evaded antitrust liability, the court struck down antisteering provision as "unfair" under California state competition law. This (minor) equitable relief did little to unseat the tech giant's continued dominance over digital marketplaces. Yet the ruling in* Epic Games *accomplished what may prove to be significant: the circuit court held that trial courts applying rule of reason analysis must apply the underutilized—even neglected—balancing stage of the rule of reason.*

This Note argues that the Ninth Circuit's ruling in Epic Games *reflects an emerging quagmire in antitrust law. As courts become more comfortable in applying the rule of reason standard in software industry tying claims, demonstrating clear anticompetitive practices may not be enough to prevail where, not only are there ever-ready procompetitive justifications for such practices, but the rule of reason as a process does not allow plaintiffs to pass go—regardless of the merits. The requirement that courts engage in fourth-stage balancing may relieve the doctrine of its implausible propensity to find*

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*non-liability and resolve inherent contradictions between findings of fact and outcomes as a matter of law. Post-*Epic Games*, if antitrust law is to remain salient in regulation of the platform software industry, courts must engage more seriously in balancing—or rather, re-balancing—a broader set of non-economic considerations and redirect courts toward the original conception of antitrust law as protector of the competitive process.*

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INTRODUCTION

In 1984, a small computer company released its first iteration of the home desktop computer.[1] Apple debuted the Macintosh in an iconic Super Bowl advertisement that satirized the plot of

1. *See* Eric Hintz, *Remembering Apple's "1984" Super Bowl Ad*, NAT. MUSEUM OF AM. HIST. (Jan. 22, 2014), https://americanhistory.si.edu/blog/2014/01/remembering-apples-1984-super-bowl-ad.html [https://perma.cc/9JCJ-2CAZ].

George Orwell's *1984*.[2] Labeling IBM as "Big Blue," or the "big brother" of the monopolistic computing industry, the ad warned of a future IBM-ruled dystopia in which tech giants controlled the economy.[3] Narrating the advertisement, Steve Jobs warned: "It is now 1984. . . . Apple is perceived to be the only hope to offer IBM a run for its money. . . . Will Big Blue dominate the entire computer industry? . . . Was George Orwell right about 1984?"[4]

Almost 40 years later, in 2020, a similar advertisement aired.[5] In an almost shot-for-shot remake, Big Blue is replaced by a personified Apple logo looming over the viewer on a large screen.[6] A character from *Fortnite*, a popular online battle-royale video game, sprints down the hall and throws a unicorn-shaped ax at the screen.[7] The Apple logo explodes into pieces, and the screen reads: "Epic Games has defied the App Store Monopoly. In retaliation, Apple is blocking *Fortnite* from a billion devices. . . . #FreeFortnite."[8] That year, Epic Games, Inc., creator of *Fortnite*, brought an antitrust lawsuit to challenge Apple's App Store developer-licensing practices.[9] Epic Games alleged that Apple engaged in a "product tying" scheme that unlawfully leveraged its dominant position in the digital distribution market to gain additional revenue in the market for digital in-app payments.[10]

Antitrust law is much older than 1984, of course. The Sherman Antitrust Act of 1890, enacted amidst societal distrust of business consolidation during the Second Industrial Revolution, prohibits any "contract, combination . . . or conspiracy" that unreasonably restrains trade, as well as monopolization or attempts to monopolize.[11] While antitrust law does not punish aggressively competitive practices, nor does it seek to protect individual

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2. *See id.*
3. *See id.*
4. Carmine Gallo, *Mac 1984: Steve Jobs Revolutionizes the Art of Corporate Storytelling*, FORBES (Jan. 24, 2014), https://www.forbes.com/sites/carminegallo/2014/01/24/mac-1984-steve-jobs-revolutionizes-the-art-of-corporate-storytelling/ [https://perma.cc/8AXL-6FME].
5. *See* Epic Games, *Nineteen Eighty-Fortnite*, YOUTUBE (Aug. 13, 2020), https://www.youtube.com/watch?v=euiSHuaw6Q4 [https://perma.cc/ZPL4-6FCU].
6. *See id.*
7. *See id.*
8. *Id.*
9. *See* Complaint at 64, Epic Games, Inc. v. Apple, Inc., 559 F. Supp. 3d 898 (N.D. Cal. 2021) (No. 4:20-cv-05640-YGR).
10. *Id.* at 36.
11. 15 U.S.C. §§ 1–2; *see also* Wayne D. Collins, *Trusts and the Origins of Antitrust Litigation*, 81 FORDHAM L. REV. 2279, 2282–88 (2013).

competitors in any given industry, the Sherman Act outlaws business conduct that undermines the competitive process in the marketplace.[12] Antitrust law broadly condemns both coordinated efforts between firms and conduct within a single firm to artificially restrict output, raise prices, or hinder the quality of output.[13] The conflict between Epic Games and Apple underscores enduring doctrinal tensions in antitrust law that remain unresolved despite 40 years of product-tying jurisprudence. Product tying, also known as a "tie-in," occurs where a seller requires a buyer to purchase an additional product to purchase the initial product. Just a few weeks after Apple's 1984 Super Bowl ad, the Supreme Court decided *Jefferson Parish Hospital District No. 2 v. Hyde*, a seminal antitrust case explaining when product tying is unlawful under the Sherman Act.[14] The Court found that antitrust law can only impose liability when a company with "market power" in one market leverages control of another market by tying the sale of one product to another, thereby inhibiting competition.[15] But the basic question in front of the Supreme Court in *Jefferson Parish*—at what point does product tying become anticompetitive—has not been resolved since. Nor has the Ninth Circuit's April 2023 decision in *Epic Games v. Apple* clarified the law.[16]

Today, courts struggle to assess antitrust liability for anticompetitive conduct in high-tech markets.[17] The cross-functionality and dynamism of innovative digital platforms and products like the iPhone prompt courts to reimagine antitrust's preeminent legal doctrine: the "rule of reason."[18] First formulated over 100 years ago, this analytic tool does not immediately outlaw

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12. *See* PHILLIP AREEDA ET AL., ANTITRUST ANALYSIS: PROBLEMS, TEXT, AND CASES 10, 28–29, 39–40 (Rachel E. Barkow ed., 8th ed. 2022).

13. *See id.* at 7–8.

14. *See* 466 U.S. 2, 2–3 (1984).

15. *Id.* at 3–4, 16.

16. *See* 67 F.4th 946, 996–97 (9th Cir. 2023) (explaining that a tie can be unlawful pursuant to either the modified per se standard *or* the rule of reason standard).

17. *See* Matthew Hodgson, *No Such Thing as Partial Per Se: Why* Jefferson Parish v. Hyde *Should Be Abolished in Favor of a Rule of Reason Standard for Tying Arrangements*, 3 BUS. ENTREPRENEURSHIP & TAX L. REV. 313, 327 (2019).

18. *See* Thibault Schrepel, *A New Structured Rule of Reason Approach for High-Tech Markets*, 50 SUFFOLK U. L. REV. 103, 105 (2017) ("[A]ntitrust law constantly shifts as new technologies emerge. . . . These advances and changes are reshuffling the cards for judicial consideration.").

behavior that appears to be anticompetitive.[19] Instead, courts weigh the anticompetitive effects and procompetitive justifications of business conduct.[20] Out of fear of hampering innovation, courts are increasingly willing to accept tech firms' procompetitive justifications and require plaintiffs to propose alternatives that would achieve those justifications without incurring additional firm costs. Yet, as courts demand more of the plaintiff's proposed alternatives, the private plaintiff's toolkit is emptying.[21] *Epic Games* is totemic of the difficulty of "close calls" in antitrust law, highlighting legitimate concerns about the judiciary's ability to assess the legality of business conduct amidst expensive, complex economic testimony.[22]

This Note argues that *Epic Games*' rule of reason analysis represents enough movement away from even-handed standards as to foreclose accurate assessment of antitrust liability in technology contexts. *Epic Games* also presents new opportunities for courts to reframe their emphasis in rule of reason balancing. Part I outlines antitrust's major rationales, explaining the rule of reason's analytical framework in technology markets. Part II contends that the rule of reason's burden-shifting process restricts adequate judicial assessment of high-tech conduct, as exemplified in *Epic Games*. Part III considers the Ninth Circuit's adoption of a balancing stage as one possible solution for antitrust law in technological markets. Then, it argues that rule of reason balancing should ask three questions regarding antitrust's overlooked noneconomic rationales to determine whether to assign liability in close calls.

I. Product Tying in Antitrust Frameworks

Modern antitrust litigation and enforcement is a creature of judicial habit. Part I.A provides historical context for the rule of reason's prominence as the lodestar of antitrust adjudication by exploring the competing rationales behind antitrust law and their historical development. Part I.A also engages with a rarely used analytical prong recently utilized by the Ninth Circuit. Part I.B

19. *See* Areeda et al., *supra* note 12, at 115 (explaining how the rule of reason standard does not procedurally or substantively prevent defendants from making arguments to rebut antitrust claims).

20. *See id.*

21. *See infra* Part II.C.

22. *See infra* Part III.A.

situates this doctrinal framework within the factual context of tying jurisprudence in the technology and software industries. After outlining scholars' competing rationales behind antitrust's role in American capitalism, Part I.B considers how these perspectives inform the courts' preoccupation with antitrust's potential chilling effects on commerce.

A. RULE OF REASON JURISPRUDENCE

1. *Antitrust Law's Wavering Rationales*

At the time Congress passed the Sherman Act, contemporaries thought rigorous antitrust enforcement would uphold a broad array of economic, social, moral, and political goals.[23] On the Senate floor, both advocates and opponents of the bill made "[r]epeated references" to the Act's purpose: ensuring "economic liberty" and "fairness in commercial intercourse" by outlawing certain dangerous forms of business conduct that were thought to concentrate too much commercial power into only a few firms.[24] Antitrust's statutory regime did not intend to guarantee the maximization of firm profits nor protect specific market competitors.[25] The doctrine maintained that some conduct must be outlawed to protect the overall competitive process, even if judicial intervention may disadvantage certain competitors.[26]

Since the passage of the Sherman Act, however, antitrust jurisprudence has slowly "excise[d]" sociopolitical notions of fairness and commercial democracy from the "antitrust lexicon" and limited its rationales to purely economic considerations.[27] Beginning in the mid-20th century, proponents of the "consumer-welfare standard," particularly Robert Bork, began to interpret antitrust law as a debate over whether business conduct is

23. *See* AREEDA ET AL., *supra* note 12, at 35–37 (citing H. THORELLI, THE FEDERAL ANTITRUST POLICY 226–27 (1954)).

24. *See* EARL W. KINTNER, THE LEGISLATIVE HISTORY OF THE FEDERAL ANTITRUST LAWS AND RELATED STATUTES 20 (1978); *see also* Richard Hofstadter, *What Happened to the Antitrust Movement?*, *in* THE PARANOID STYLE IN AMERICAN POLITICS AND OTHER ESSAYS 199–200 (2008) (noting that alongside economic goals, antitrust "intended to block private accumulations of power," "protect democratic government," and create a "disciplinary machinery" for business conduct).

25. *See, e.g.*, Atl. Richfield Co. v. USA Petroleum Co., 495 U.S. 328, 338 (1990).

26. *See id.* at 129, 137.

27. PHILLIP E. AREEDA & HERBERT HOVENKAMP, ANTITRUST LAW: AN ANALYSIS OF ANTITRUST PRINCIPLES AND THEIR APPLICATION 146 (3d. ed. 2008).

ultimately beneficial or detrimental to the consumer.[28] Bork argued that firms could maximize the "allocative efficiency" of their resources, as long as antitrust enforcement maintained a healthy competitive marketplace.[29] Then, these firms could price their products just above the marginal cost of production—the lowest possible price for consumers.[30]

Modern scholars have noted that antitrust rationales have largely departed from Congress's original intent behind the Sherman Act.[31] The "political, social, and moral goals" that were once central to antitrust are now thought to "somehow dilut[e] antitrust policy," and are rarely considered when deciding difficult cases.[32] Instead, much of modern antitrust litigation depends on the outcome of complex economic testimony regarding the conduct's effects on price or output.[33]

2. *Early Conceptions of the Rule of Reason and the Development of Burden Shifting*

Because few acts are so obviously anticompetitive that they are per se unlawful, courts analyze most antitrust allegations under the rule of reason.[34] The rule of reason analysis investigates the

28. ROBERT H. BORK, THE ANTITRUST PARADOX: A POLICY AT WAR WITH ITSELF 50 (1978) [hereinafter BORK, ANTITRUST PARADOX]; *see also* Robert H. Bork, *The Goals of Antitrust Policy*, 57 AM. ECON. REV. 242, 243 (1967). In the 1960s and 1970s, Bork's Chicago School popularized the notion that antitrust law's singular focus should be to advance consumer welfare. *See, e.g.*, Robert H. Bork, *Resale Price Maintenance and Consumer Welfare*, 77 YALE L.J. 950 (1968); Daniel A. Crane, *The Tempting of Antitrust: Robert Bork and the Goals of Antitrust Policy*, 79 ANTITRUST L. J. 835, 835–37 (2014).

29. BORK, ANTITRUST PARADOX, *supra* note 28, at 50–54.

30. *See id.* The assumption of the "self-correcting" market has been criticized as oversimplifying the result of business competition. *See* Maurice E. Stucke, *Reconsidering Antitrust's Goals*, 53 B.C. L. REV. 551, 556 (2012) [hereinafter Stucke, *Reconsidering*] ("Adopting . . . simplifying assumptions of self-correcting markets . . . some courts and enforcers sacrificed important political, social, and moral values to promote certain economic beliefs.").

31. *See, e.g.*, Stucke, *Reconsidering*, *supra* note 30, at 552–53; Kenneth G. Elzinga, *The Goals of Antitrust: Other than Competition and Efficiency, What Else Counts?*, 125 U. PA. L. REV. 1191, 1211–13 (1977).

32. Stucke, *Reconsidering*, *supra* note 30, at 556; Herbert Hovenkamp, *Antitrust Violations in Securities Markets*, 28 J. CORP. L. 607, 609 (2003) ("[A]ntitrust has no moral content and is unconcerned about the distribution of wealth.").

33. *See, e.g.*, Stucke, *Reconsidering*, *supra* note 30, at 556 ("Antitrust's increased technicality and . . . abstract economic concepts broadened the gap between antitrust enforcement and public concern."); Kenneth G. Elzinga, *In the Beginning: The Creation of the Economic Expert in Antitrust*, 65 J.L. & ECON. 519, 519–20 (2022).

34. *See* Mark A. Lemley & Christopher R. Leslie, *Categorical Analysis in Antitrust Jurisprudence*, 93 IOWA L. REV. 1207, 1209–13 (2008). Antitrust law is generally trending

anticompetitive effects of a purported antitrust violation, as well as the firm's procompetitive justifications for such behavior.[35] In 1898, writing for the Sixth Circuit, then-Judge Taft articulated the first iteration of the rule of reason in *United States v. Addyston Pipe & Steel Co.*, noting that the legality of a business agreement turns on whether the restraint on trade was reasonably necessary for the agreement to exist at all.[36] In *Standard Oil Co. of New Jersey v. United States*, the Supreme Court built on this formulation and held that courts must analyze the effects of the restraint in "equipoise or balance" with "protection of the rights of individuals."[37] Ultimately, in *Board of Trade of City of Chicago v. United States* (*Chicago Board of Trade*), Justice Brandeis established the rule of reason as a balancing test that assesses whether the conduct ultimately enhances or "suppress[es]" competition based on "facts peculiar to the business."[38]

Early cases did not decide whether a court is capable of balancing competing arguments about the business conduct's effect on competition.[39] Modern courts have not resolved this question, but many jurists perceive balancing to be an unworkable and indeterminate method.[40] At the same time, courts have routinely characterized the rule of reason as a balancing test. *Chicago Board of Trade*'s "search for net competitive effects" has "become entrenched" across lower courts.[41] In practice, however,

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away from using bright-line rules or presumptions, and most conduct today is judged under the rule of reason as the default. *See id.*

35. *See id.* at 1215.

36. *See* 85 F. 271, 281 (6th Cir. 1898). Despite advising courts against "set[ting] sail on a sea of doubt" by determining what conduct is reasonable, Taft's extensive discussion of ancillarity suggests he does consider the weight of the restraint's effect against the larger benefit it provides to the parties and industry competition. *Id.* at 284.

37. 221 U.S. 1, 55 (1911).

38. 246 U.S. 231, 238 (1918). Brandeis explained that "[t]he true test of legality is whether the restraint imposed is such as merely regulates and perhaps thereby promotes competition or whether it is such as may suppress . . . competition." *Id.* at 244.

39. *See* Maurice E. Stucke, *Does the Rule of Reason Violate the Rule of Law?*, 42 U.C. DAVIS L. REV. 1375, 1382, 1390–91, 1398 (2009) [hereinafter Stucke, *Violate the Rule*].

40. *See* Herbert Hovenkamp, *The Rule of Reason*, 70 FLA. L. REV. 81, 132 (2018) [hereinafter Hovenkamp, *Rule of Reason*]. Among others, Judge Taft expressed anxiety in "assuming such a power in the courts" and leaving too much discretion in the hands of judges. *Addyston Pipe*, 85 F. at 284.

41. Gabe Feldman, *The Demise of The Rule of Reason*, 24 LEWIS & CLARK L. REV. 951, 957–58 (2020) [hereinafter Feldman, *The Demise*]; *see also* United States v. Microsoft Corp., 253 F.3d 34, 59 (D.C. Cir. 2001) ("[T]he courts routinely apply a . . . balancing approach under the rubric of the "rule of reason."); Orson, Inc. v. Miramax Film Corp., 79 F.3d 1358, 1367 (3d Cir. 1996) (explaining that *Chicago Board of Trade* balancing has "essentially remained unchanged" since early rule of reason analysis).

balancing appears to be little more than an ethos.[42] Decades of litigation illustrate that actual attempts to balance competing arguments are rare.[43]

In the overwhelming majority of cases today, courts conduct the rule of reason analysis within a burden shifting framework.[44] Under the Supreme Court's most recent articulation of the rule of reason in *Ohio v. American Express*, courts must evaluate the alleged conduct under a three-step analysis.[45] First, the plaintiff has the burden to prove that the restraint has a "substantial anticompetitive effect" through increased prices or decreased output.[46] Then, if the plaintiff can make this showing, the burden shifts to the defendant to demonstrate that there are "procompetitive rationales" for the restraint.[47] If the defendant can present compelling rationales, the burden shifts back to the plaintiff to demonstrate that these procompetitive justifications could be achieved through a "less restrictive alternative."[48] The lower courts have developed their own less restrictive alternatives tests. In the Ninth Circuit, for example, a plaintiff can show a "substantially less restrictive alternative" if the alternative can serve the defendant's purported procompetitive purposes "without significantly increased costs."[49]

3. *The Mysterious Fourth Step: An Analytical Afterthought?*

When a plaintiff's showing of anticompetitive effects is matched by the defendant's procompetitive justifications, courts have disagreed on how to proceed. The Supreme Court omitted

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42. *See* Michael A. Carrier, *The Real Rule of Reason: Bridging the Disconnect*, 1999 BYU L. REV. 1265, 1268 (1999) [hereinafter Carrier, *Bridging Disconnect*].

43. This is especially true as economic analysis in antitrust litigation has become more extensive and complex. *See* Hovenkamp, *Rule of Reason*, *supra* note 40, at 131–32; *see also* Michael A. Carrier, *The Rule of Reason: An Empirical Update for the 21st Century*, 16 GEO. MASON L. REV. 827, 828 (2009) [hereinafter Carrier, *Empirical Update*] (concluding from a study of 495 modern rule of reason cases in federal courts that balancing occurs in only two percent of cases). A similar study concluded that, in 96% of rule of reason cases, courts do not engage with balancing analysis, nor even purport to. *See* Carrier, *Bridging Disconnect*, *supra* note 42, at 1267–68.

44. *See* Carrier, *Empirical Update*, *supra* note 43, at 828–30; Stucke, *Violate the Rule*, *supra* note 39, at 1385–86.

45. *See* 585 U.S. 529, 541 (2018).

46. *Id.*

47. *Id.*

48. *Id.* at 542.

49. Epic Games, Inc. v. Apple, Inc., 67 F.4th 946, 990 (9th Cir. 2023) (quoting Cnty. of Tuolumne v. Sonora Cmty. Hosp., 236 F.3d 1138, 1159 (9th Cir. 2001)).

balancing in *American Express* and instead chose to position the less restrictive alternative analysis as the dispositive factor in close calls.[50] Although the burden-shifting framework implies that courts will look to countervailing evidence, the rule of reason does not necessarily *require* a court to balance competing evidence. This is especially true if a plaintiff cannot first show that the procompetitive efficiencies "could be reasonably achieved" through less restrictive alternatives as a matter of increased firm efficiency or decreased costs.[51]

Despite the Supreme Court's recent articulation of a discrete three-step framework without balancing, the Ninth Circuit has charted a different course.[52] The Ninth Circuit has stated that after analyzing anticompetitive effects, procompetitive justifications, and less restrictive alternatives, the "court *must* weigh the harms and benefits to determine if the behavior is reasonable on balance" in an additional analytical step.[53] Because the Ninth Circuit requires a fourth analytical step, a plaintiff in the Ninth Circuit does not lose their case if they fail to proffer a compelling less restrictive alternative. Instead, the court must reach the balancing stage whenever valid anticompetitive effects and procompetitive justifications are present.[54] The less

50. *See* Ohio v. Am. Express Co., 585 U.S. 529, 542 (2018). This has directed lower courts to prioritize the less restrictive alternative prong as the crucial factor in the rule of reason, which leaves balancing largely irrelevant. *See* Feldman, *The Demise*, *supra* note 41, at 951, 957 ("Every federal circuit has adopted . . . different new permutations . . . each using a form of the less restrictive alternative analysis as a dispositive factor while subverting or eliminating the traditional balancing of competitive effects.").

51. *American Express*, 585 U.S. at 542; *see also* Gabriel A. Feldman, *The Misuse of The Less Restrictive Alternatives Inquiry in Rule of Reason Analysis*, 58 AM. U. L. REV. 561, 585–86 (2009) [hereinafter Feldman, *The Misuse*].

52. Epic Games, Inc. v. Apple, Inc., 67 F.4th 946, 994 (9th Cir. 2023) (adopting a four-step framework while acknowledging the Supreme Court's use of a three-step framework in *Ohio v. American Express*).

53. Bhan v. NME Hosp., Inc., 929 F.2d 1404, 1413 (9th Cir. 1991) (emphasis added). The Ninth Circuit, however, has been inconsistent in its application of the fourth step, failing to engage in the balancing step in some recent cases. *See, e.g.*, PLS.com, LLC v. Nat'l Ass'n of Realtors, 32 F.4th 824, 834 (9th Cir. 2022); Aya Healthcare Servs., Inc. v. AMN Healthcare Inc., 9 F.4th 1102, 1111 (9th Cir. 2021). Other cases apply the rule of reason with balancing as either an explicit focus of the analysis, or describe the rule of reason as a three-step inquiry, but include balancing in their analysis. *See, e.g.*, *Epic Games*, 67 F.4th at 994; *In re* Nat'l Collegiate Athletic Ass'n Athletic Grant-in-Aid Cap Antitrust Litig., 958 F.3d 1239, 1263 (9th Cir. 2020); Los Angeles Memorial Coliseum Comm'n v. Nat'l Football League, 726 F.2d 1381, 1391 (9th Cir. 1984).

54. *See* Cnty. of Tuolumne, 236 F.3d at 1160 ("*Because* plaintiffs have failed to meet their burden of advancing viable less restrictive alternatives, we reach the balancing stage. We must balance the harms and benefits of the privileging criteria to determine whether they are reasonable.") (emphasis added).

restrictive alternatives step allows the plaintiff to prevail before the balancing stage begins, but it cannot substitute for balancing without "short-circuit[ing] the analysis."[55] Thus, as long as the plaintiff can show that the conduct is net anticompetitive, the Ninth Circuit's framework suggests that a plaintiff does not need to show a less restrictive alternative to prevail.[56]

While the Ninth Circuit has outlined the fourth step in a number of opinions, it has rarely applied it; a majority of Sherman Act claims fail on earlier analytical prongs.[57] Nonetheless, even jurists who have advocated against the balancing exercises have advocated for it when burden shifting is insufficient to determine the proper outcome.[58] Balancing ensures that courts do not "truncat[e] the analysis" merely because the plaintiff did not "hit a walk-off home run" in the alternatives stage.[59]

B. TYING ARRANGEMENTS AND THEIR CHANGING JUSTIFICATIONS

1. *What is a Tie?: Antitrust's Package Deal*

Courts conducting rule of reason analysis must make a rational judgment regarding the desirability of various forms of business conduct. One form of business conduct under antitrust scrutiny in both physical and digital product markets is the product "tie."[60]

55. *See* C. Scott Hemphill, *Less Restrictive Alternatives in Antitrust Law*, 116 COLUM. L. REV. 927, 928–30, 941 (2016) [hereinafter Hemphill, *Alternatives*] ("[Less restrictive alternatives] and net-effects steps are alternative ways to establish liability."). When faced with mixed conduct, use of less restrictive alternatives is a way to avoid the "[t]horny issues" of balancing." *See id.*; Michael A. Carrier, *The Four Step Rule of Reason*, 33 ANTITRUST 50, 52 (2019) [hereinafter Carrier, *Four Step*].

56. *See* Hemphill, *Alternatives*, *supra* note 55, at 928–30.

57. *See* Carrier, *Four Step*, *supra* note 55, at 51 (explaining that because a strong majority of claims fail to show anticompetitive effects, examples of fourth stage balancing are sparse).

58. *See* Hovenkamp, *Rule of Reason*, *supra* note 40, at 134 ("A better way to view balancing is as a last resort when the defendant has offered a procompetitive explanation for a prima facie anticompetitive restraint, but no less restrictive alternative has been shown. At that point the basic burden shifting framework has gone as far as it can.").

59. Carrier, *Four Step*, *supra* note 55, at 54 (arguing that omission of the balancing stage by requiring a less restrictive alternative affected case outcome in two recent Ninth Circuit cases).

60. *See* Gary Myers, *Tying Arrangements and the Computer Industry:* Digidyne Corp. v. Data Gen. Corp., 1985 DUKE L.J. 1027, 1047–49 (noting in the early age of technology litigation, ties in the tech context were "generally not . . . deemed illegal" without strong attention to the "redeeming virtues" of the defendant's business justification); Alan Devlin,

Tying occurs when a seller will only sell one product (the "tying" product) on the condition that the buyer must also purchase another product (the "tied" product) from that seller.[61] When firms use their dominance in the tying product market to coerce purchases in a separate market, tying is anticompetitive. It undercuts interbrand competition by preventing buyers from making purchase decisions based on the merits of the tied product's quality and price alone.[62]

At the same time, economists and jurists have recognized many procompetitive justifications for tying arrangements in the technology and software industries, also known as "tech-tying."[63] The consumer-welfare standard suggests that tying arrangements reduce inefficient costs, which allows firms to pass on cost savings to buyers through lower prices.[64] Additionally, when software is the tied product, tying can optimize cross-functionality or make new products possible.[65] Tech defendants have recently pointed to other indirect benefits of tying arrangements, including improving data privacy and security measures, differentiating their products in an oversaturated market, protecting firm intellectual property, and "enhanc[ing] consumer appeal."[66]

A Neo-Chicago Perspective on the Law of Product Tying, 44 AM. BUS. L.J. 521, 560 (2007) (describing how ties are often deemed legal on efficiency-enhancing grounds).

61. *See* AREEDA ET AL., *supra* note 12, at 582. A classic example of product tying is a printer that only operates with separately sold printer cartridges made by the same company. *See* Erik Hovenkamp & Herbert J. Hovenkamp, *Tying Arrangements and Antitrust Harm*, 52 ARIZ. L. REV. 925, 925 (2010).

62. *See, e.g.*, Ill. Tool Works, Inc. v. Indep. Ink, Inc., 547 U.S. 28, 34–35 (2006); Eastman Kodak Co. v. Image Tech. Servs., Inc., 504 U.S. 451, 464 (1992); Continental T.V., Inc. v. GTE Sylvania, Inc., 433 U.S. 36, 51 (1977); Fortner Enter., Inc. v. United States Steep Corp., 394 U.S. 495, 498–99 (1969); N. Pac. Ry. Co. v. United States, 356 U.S. 1, 6–7 (1958).

63. *See* Emma C. Smizer, Epic Games v. Apple: *Tech-Tying and the Future of Antitrust*, 41 LOY. L.A. ENT. L. REV. 215, 240–41 (2021); *see also* Hodgson, *supra* note 17, at 328–29 (explaining that tying arrangements stimulate demand, increase efficiency, and allow for lower transaction costs).

64. *See* Todd J. Anlauf, *Severing Ties with the Strained Per Se Test for Antitrust Tying Liability: The Economic and Legal Rationale for a Rule of Reason*, 23 HAMLINE L. REV. 476, 501 (2000) (arguing that a firm can often "pass on the cost efficiencies" to purchasers); Hodgson, *supra* note 17, at 328 ("[B]undling lets buyers get more product for less cost, which proves a great benefit to the consumer.").

65. *See* Adam Weg, *Per Se Treatment: An Unnecessary Relic of Antitrust Litigation*, 60 HASTINGS L.J. 1535, 1545 (2009).

66. Fed. Trade Comm. v. Qualcomm Inc., 969 F.3d 974, 991 (9th Cir. 2020) (citing Eastman Kodak Co. v. Image Tech. Servs., Inc., 504 U.S. 451, 483 (1992)); *see also* Epic Games, Inc. v. Apple, Inc., 67 F.4th 946, 986 (9th Cir. 2023) (explaining that the closed ecosystem on the App Store creates a distinct consumer market for consumers who prefer Apple's privacy and security features).

Antitrust courts have often been wary of chilling product innovation, especially in the technology industry.[67] Jurists have opined that since consumers prefer integrated technology and adaptable products, ties should be a laudable business goal.[68] Consumers and tech experts have applauded the ability of new innovative products to create new markets and expand the scope of current markets.[69] Economists have also suggested that innovation in technology markets organically prevents, or promptly upends, monopolies.[70] Some antitrust circles champion relaxed enforcement to encourage the growth of emerging technology. This is especially true in volatile industries that are thought to rely on a new firm leveraging their innovative features to overthrow the incumbent monopolist.[71]

While innovation is a longstanding procompetitive justification, other scholars have argued that intensive focus on innovation in technology markets also leads to harmful antitrust underenforcement.[72] Innovative products creating short-term efficiencies for consumers may simultaneously fail to yield long-term procompetitive results.[73] It is "dangerous to assume," based

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67. *See* Kara E. Harchuck, Microsoft IV: *The Dangers to Innovation Posed by the Irresponsible Application of a Rule of Reason Analysis to Product Design Claims*, 97 NW. U.L. REV. 395, 396, 399 (2002) ("[M]ost judges have found it difficult to punish innovators and thereby chill or stifle innovation . . . This call for judicial restraint is particularly emphatic in cases that involve highly technical . . . products.").

68. *See* Stan J. Liebowitz & Stephen E. Margolis, *Bundling and Unbundling in New Technology Markets: Seven Easy Pieces: The Ideal is the Enemy of the Efficient*, *in* COMPETITION POLICY AND PATENT LAW UNDER UNCERTAINTY: REGULATING INNOVATION 77, 118–19 (Geoffrey A. Manne & Joshua D. Wright eds., 2011). Product ties can lead to overenforcement as a result. *See* Joshua D. Wright, *Antitrust, Multidimensional Competition, and Innovation: Do We Have an Antitrust-Relevant Theory of Competition Now?*, *in* COMPETITION POLICY AND PATENT LAW UNDER UNCERTAINTY: REGULATING INNOVATION 228, 229–30 (Geoffrey A. Manne & Joshua D. Wright eds., 2011).

69. *See* John H. Newman, *Anticompetitive Product Design in the New Economy*, 39 FLA. ST. U. L. REV. 681, 690–92 (2012).

70. *See id.* at 691–92 (discussing innovation as a monopolization inhibitor).

71. *See id.* at 692–93 ("[A]dherents call for a reduced role of antitrust enforcement in markets that seem to thrive on innovation-based rivalry."). *But see* Anlauf, *supra* note 64, at 499–500 (arguing that judicial attention to industry innovation has not necessarily affected enforcement).

72. *See* Newman, *supra* note 69, at 693 ("It is not at all certain that the monopolies created in digital product markets will be fleeting or quickly destroyed by subsequent innovations. Thus . . . call[s] for antitrust enforcement to play a limited role . . . should not dictate [outcomes]. . . .").

73. *See* Thomas H. Au, *Anticompetitive Tying and Bundling Arrangements in the Smartphone Industry*, 16 STAN. TECH. L. REV. 188, 190–91 (2012) ("While integrated consumer technology products may produce procompetitive efficiencies, not all product combinations are procompetitive . . . Due to the complexity of consumer products, . . .

on a market's past innovation, that markets will necessarily maintain a competitive landscape or that monopolist firms will always be held in check.[74] Scholars have noted that the nature of high-tech markets may "even uniquely incentivize anticompetitive behavior" due to heightened "network effects" and strong barriers to entry.[75]

2. *Tying's Shifting Judicial Approach*

Despite a rich history of antitrust litigation over tying claims, courts have failed to create a "coherent and predictable analytical approach" to assess their legality.[76] Early courts applied a per se standard to tying claims, concluding that there are no viable procompetitive rationales to justify a tie.[77] As part of a broader decline of judicial presumptions in antitrust law, courts in the 1970s and 1980s loosened the strict per se application to tying claims and began to consider possible business justifications for such arrangements.[78] In *Jefferson Parish*, the Court rejected calls to formally overturn precedent that considered tying per se illegal. Instead, the Court adopted a modified per se standard that requires plaintiffs to show four elements to demonstrate their claim should be assessed under the per se standard.[79]

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consumers may not even be aware they are paying higher prices than they should, if the markets were more competitive.").

74. *See* Newman, *supra* note 69, at 692–94. Innovation cannot prevent concentration of market power "where the market leader refuses to allow interoperability," as new, innovative products may not sufficiently "tempt users away" from the established dominant network. *See id.* at 693.

75. Thomas A. Piraino, Jr., *A Proposed Antitrust Approach to High Technology Competition*, 44 WM. & MARY L. REV. 65, 77, 86–87 (2002). Network effects is an economic principle suggesting that the value of a marketplace increases as more participants join in the market. *See* John M. Yun, *Does Antitrust Have Digital Blind Spots?*, 72 S.C. L. REV. 305, 313–14 (2020). Most two-sided transaction markets exhibit network effects. *See id.* Digital platform markets are especially ripe for exclusion of new market entrants through heavy intellectual property burdens, predatory pricing strategies, and other "design-related behavior." Newman, *supra* note 69, at 694–95.

76. Anlauf, *supra* note 64, at 485.

77. *See* N. Pac. Ry. Co. v. United States, 356 U.S. 1, 5–8 (1958); Int'l Salt Co. v. United States, 332 U.S. 392, 398 (1947).

78. *See* United States Steel Corp. v. Fortner Enter., Inc., 429 U.S. 610 (1977); Fortner Enter., Inc. v. United States Steel Corp., 394 U.S. 495, 499–501 (1969).

79. *See* Jefferson Parish Hosp. Dist. No. 2 v. Hyde, 466 U.S. 2, 9 (1984). In practice, this standard looks to requirements that are also considered within rule of reason analysis: the plaintiff must show that (1) the tied products are two separate products; (2) the defendant firm has sufficient market power in the tying market; (3) consumers had no choice to purchase the tied product; and (4) a substantial amount of commerce is affected by the tied product. *See id.* at 2–4.

The circuit courts have supplied the majority of caselaw on product tying in the tech context. In 2001, the D.C. Circuit applied the rule of reason in antitrust litigation against Microsoft, expressing a preference for doing so in technology and software contexts.[80] The Supreme Court has not yet weighed in on Microsoft—nor has the Court assessed tying in digital-platform contexts—but in other antitrust settings, it emphasized that the per se standard is still the proper analytical framework for tying claims that have a "probability of anticompetitive consequences."[81] Contemporary courts are unlikely to find such tying arrangements inherently anticompetitive, yet they struggle to break from Supreme Court precedent by formally applying the rule of reason standard to tying claims.[82]

The application of more permissive rule of reason standards in software tying claims can have real consequences in the outcomes of major antitrust litigation. These consequences are on fully display in *Epic Games*.

II. *EPIC GAMES V. APPLE*: ANTICOMPETITIVE YET PROCOMPETITIVE PROBLEMS

The sheer pervasiveness of digital technology platforms has forced courts to revise how antitrust law conceives of the very concept of the marketplace. Part II.A describes how legal challenges to novel high-tech platforms and digital download ecosystems require courts to reconceptualize antitrust's rationales constantly. Part II.B dissects Epic Games' challenge to Apple's App Store dominance and illustrates the broader structural and commercial consequences of antitrust litigation. Part II.C contends that the rule of reason has not—and cannot—properly engage with questions of liability. Instead, this test has tipped the scale of litigation in favor of underenforcement.

80. *See* United States v. Microsoft Corp., 253 F.3d 34, 84 (D.C. Cir. 2001).

81. *See* Illinois Tool Works, Inc. v. Indep. Ink, Inc., 547 U.S. 28, 37 (2006). As a result of *Illinois Tool*, *Microsoft*'s rule of reason holding for tech-ties has been not been applied broadly across jurisdictions. *See, e.g.*, Cascade Health Sol. v. PeaceHealth, 515 F.3d 883, 913 (9th Cir. 2008) (applying a per se standard to tying claim).

82. *See* Devlin, *supra* note 60, at 521 (describing how tying claims have been "surprisingly resistant" to the "recent surge" of economic analysis encouraging use of the rule of reason standard).

A. ANTITRUST IN MODERN SOFTWARE CONTEXTS: CULTIVATING DIGITAL DOWNLOADS IN APPLE'S WALLED GARDEN

1. *The App Store and Digital Distribution Markets*

One in two Americans own an iPhone.[83] An overwhelming number of iOS smartphone and tablet users download mobile applications from the digital App Store, which conveniently comes preinstalled on their devices and offers over one million apps for download.[84] Unlike other mobile operating systems such as Windows or Android, Apple's mobile operating system (iOS) is a "walled garden," or a "closed ecosystem" that restricts the integration of third-party marketplaces.[85] iPhone and iPad users can only download approved apps from the App Store—the only app distribution marketplace allowed on Apple devices—and developers cannot interact directly with their end users without intermediation by Apple.[86]

Due to Apple's substantial consumer base, the App Store is one of the primary markets in which app developers like Epic Games can effectively market and distribute their products.[87] In exchange for providing Epic Games access to almost one billion iPhone users, Apple benefits from the diversity and quality of goods that developers like Epic Games bring to the App Store.[88] To place a mobile application on the App Store for download onto iOS devices, developers must sign an agreement with Apple.[89] Under Apple's

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83. *See* Nick Routley, *iPhone Now Makes Up the Majority of U.S. Smartphones*, VISUAL CAPITALIST (Sept. 9, 2022), https://www.visualcapitalist.com/iphone-majority-us-smartphones/ [https://perma.cc/Y6N7-3S28]. This statistic is based on the number of American citizens who own or operate a mobile cellular device. *See id.*

84. *See* Laura Ceci, *Number of Apps Available in Leading Apps Stores as of 3rd Quarter 2022*, STATISTA (Aug. 29, 2023), https://www.statista.com/statistics/276623/number-of-apps-available-in-leading-app-stores/ [https://perma.cc/3B9Y-4YTT].

85. Epic Games, Inc. v. Apple, Inc., 67 F.4th 946, 967 (9th Cir. 2023). In high-tech markets, walled garden ecosystems are among the "most invidious conduct," as the relative "openness" of particular ecosystems can determine the degree of competition of the market. Ashley Ulrich, *Crediting Procompetitive Justifications for Digital Platform Defendants: Continued Salience of a Broad, Efficiencies-Focused Approach*, 10 NYU J. INTELL. PROP. & ENT. L. 95, 118 (2020); *see also* Diane Coyle, *Practical Competition Policy Implications of Digital Platforms*, 82 ANTITRUST L.J. 835, 857 (2019) ("Open and interoperable standards can be important enablers of competition.").

86. *See Epic Games*, 67 F.4th at 967.

87. Complaint at 18, Epic Games, Inc. v. Apple, Inc., 559 F. Supp. 3d 898 (N.D. Cal. 2021) (No. 4:20-cv-05640-YGR).

88. *See Epic Games*, 67 F.4th at 966.

89. *See id.* at 968.

Developer Program Licensing Agreement (DPLA), developers pay a one-time fee of $99 for the ability to place their app on the App Store.[90] Apple also collects a 30% commission on all purchases, including the upfront cost to download the app and ongoing digital, in-app purchases.[91] Developers must also agree to use Apple's in-app payment processing system (IAP), which a developer cannot replace with a third-party payment processor.[92] Because the same products are usually available to buy for lower prices on other platforms, like the developer's own website, the DPLA forbids developers from "steering" their users outside of the App Store or the app itself to make such purchases.[93] This is known as an antisteering policy.

Although Epic Games sold digital *Fortnite* products more cheaply on its webstore than on the App Store, the DPLA prohibited Epic Games from using direct links or other methods to inform buyers of this.[94] In protest of Apple's developer-licensing practices, Epic Games violated the DPLA in August 2020 by installing a "hotfix" into the *Fortnite* app: its own payment system through which gamers could purchase digital goods without using Apple's IAP.[95] The payment processor did not give a commission to Apple, and Epic Games passed on the savings to *Fortnite* users through a 20% discount on in-app game purchases.[96] Apple called the hotfix a "Trojan horse" maneuver and immediately removed *Fortnite* from the App Store.[97] Epic Games promptly sued Apple.

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90. *See id.*

91. *See* Epic Games, Inc. v. Apple, Inc., 67 F.4th 946, 967–69 (9th Cir. 2023).

92. *See id.* at 968.

93. *See id.* The DPLA, prior to this lawsuit, read: "[a]pps and their metadata may not include buttons, external links, or other calls to action that direct customers to purchasing mechanisms other than the [IAP]." *Id.*

94. *See id.* at 968–69.

95. *See id.* This fact was uncontested at trial, *see id.* at 968, but created considerable public outcry from *Fortnite* gamers, who argue that they should be able to receive the lowest price regardless of the source of the digital good. *See* James Clayton, *Fortnite: Apple Ban Sparks Court Action from Epic Games*, BBC (Aug. 13, 2020), https://www.bbc.com/news/technology-53773715 [https://perma.cc/54Y4-5Q5Q].

96. Complaint at 19, Epic Games v. Apple, 559 F. Supp. 3d 898 (N.D. Cal. 2021) (No. 4:20-cv-05640-YGR).

97. Lucas Manfredi, *Apple Says Epic Games' Lawsuit Is a Publicity Stunt to 'Reinvigorate' Fortnite*, FOX BUS. (Sept. 16, 2020), https://www.foxbusiness.com/technology/apple-says-epic-games-lawsuit-is-a-publicity-stunt-to-reinvigorate-fortnite [https://perma.cc/A9MK-3KF8].

2. *Tying the App Store to In-App Purchases Through Antisteering*

In its complaint to the Northern District of California, Epic Games alleged that Apple had exercised anticompetitive restraints and monopolistic practices by distributing software applications and payment processing for digital content.[98] Epic Games' tying claim alleged that Apple violated Section 1 of the Sherman Act by unlawfully tying the in-app purchasing market to the iOS app distribution market.[99] By requiring third-party developers to distribute their apps using the App Store's IAP, Epic Games claimed that Apple leveraged its control over the app distribution market to eliminate competition in the in-app payment market.[100] Because the iOS user base is a "must have" market for app developers, the DPLA prevented developers from seriously competing in the app-development business.[101]

Epic Games also argued that by "gagging" developers from informing users of competing payment options, the antisteering provision reduced interbrand competition for in-app payments.[102] If developers could not provide end users with information on cheaper ways to purchase digital assets through push notifications to user devices, email outreach, or hyperlinks, then Apple could be sure that IAP would process all in-app purchases. There would be no competition in the in-app purchasing market.[103] The antisteering provision was thus a key mechanism to facilitate Apple's distribution dominance and ensure that their tying

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98. *See* Complaint at 4, *Epic Games*, 559 F. Supp. 3d 898.

99. *See id.* at 56–58. Epic Games accused Apple of using its dominant market position as the world's largest public company to force anticompetitive contractual provisions onto third-party app developers. *See id.* at 4–5, 13.

100. *See id.* at 56–59.

101. *See* Complaint at 18, *Epic Games*, 559 F. Supp. 3d 898. Epic Games claimed that a key goal of Apple's business model is capturing Apple users. *See id.* at 17–19. Epic Games pointed to Apple users' particularly high mobile-app spend—twice that of Android users—as a reason they focus on Apple consumers. *See id.*

102. *Id.* at 35–36 ("These [antisteering provisions] enumerate Apple's anti-competitive tying policy: an app developers' access to the App Store . . . is conditioned on . . . Apple's In-App Purchase to process payments. . . . These draconian policies serve to cement Apple's monopoly position in the iOS [IAP] Market.").

103. *See* Epic Games, Inc. v. Apple, Inc., 67 F.4th 946, 1001 (9th Cir. 2023). Once users have started playing the game, they can purchase "V-Bucks," or in-game currency that uses the gamer's real-world funds to gain a competitive advantage in the virtual game. *See* Matt Kim, *Fortnite's V-Bucks Currency is Another Battleground for a Community at Odds*, US GAMER (Mar. 1, 2018), https://web.archive.org/web/20180323031201/https://www.usgamer.net/articles/fortnite-battle-royale-save-the-world-v-bucks-grinding [https://perma.cc/TM5L-N3W]. User purchase of V-bucks and similar digital assets are important to Epic Game's monetization in their "free-to-play" business model. *See id.*

arrangement would have enough bite to guarantee their 30% commission.[104] Alongside their Sherman Act claims, Epic Games also alleged that Apple's DPLA practices violated California's Unfair Competition Law (UCL) provision prohibiting any "unlawful, unfair, or fraudulent business act or practice."[105]

B. *EPIC GAMES V. APPLE*: THE TROJAN HORSE ENTERS TROY

This section outlines the rationales of the *Epic Games* trial and appellate courts to illustrate broader concerns in rule of reason analysis. Part II.B.1 explains the trial court's findings. Part II.B.2 underscores the appellate court's determinations of law that applied a rule of reason standard to tying in software contexts and adopted a fourth-step balancing stage. Part II.B.3 explores various tensions within the appellate court's assessment of anticompetitive conduct that suggest the need for courts to reconsider the boundaries of antitrust liability.

1. *Initial Rule of Reason Review*

Through exhaustive economic expert testimony, Epic Games showed that Apple's DPLA practices were anticompetitive in that the distribution restrictions undermined competition, increased consumer prices, and decreased output and innovation.[106] The trial court found that "Apple's restrictions foreclose[d] competition for large game developers who have well-known games" and prevented developers such as Epic Games from "open[ing] their own store to forego Apple's fees, rules, and review."[107] Trial evidence demonstrated that Apple's restrictions on iOS game

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104. *See* Epic Games, Inc. v. Apple, Inc., 559 F. Supp. 3d 898, 1054–55 (N.D. Cal. 2021). According to Apple, Epic Games made over $700 million across over 100 million iOS user accounts from *Fortnite* downloads on the App Store, meaning that Apple earned roughly $210 million under this agreement. *See* Dkt. No. 405, *Epic Games*, 559 F. Supp. 3d 898 (No. 4:20-cv-05640-YGR). While one could surmise that the antisteering provision was ineffectual, as gamers could search for alternative ways to purchase *Fortnite* V-bucks outside of the App Store, trial evidence showed that the antisteering provision was an effective mechanism to prevent consumer knowledge of alternative purchasing methods. *See infra* Part II.B.2.

105. CAL. BUS. & PROF. CODE § 17200 (West 2023); *see also Epic Games*, 559 F. Supp. 3d at 1051 (alleging unfair business conduct through Apple's antisteering practices).

106. *See Epic Games*, 559 F. Supp. 3d at 995–1001. The trial consisted of a 16-day bench trial, dozens of witnesses, and 900 exhibits. *See* Epic Games, Inc. v. Apple, Inc., 67 F.4th 946, 966 (9th Cir. 2023).

107. *Epic Games*, 559 F. Supp. 3d at 996 (internal citations omitted).

distribution and payment processing increased prices for developers and hampered product quality.[108] Turning to Apple's procompetitive "business justifications," the court found that security, privacy, and intellectual property protection were valid, nonpretextual reasons for Apple's restrictions banning third-party stores and payment processors.[109] The court found that Apple benefits consumers by differentiating its product from other operating systems with less-secure ecosystems.[110] Additionally, the court accepted Apple's argument that developers benefit from the DPLA because a large consumer base is drawn to products with strong privacy and security features.[111]

The court dismissed Epic Games' claim that Apple's restrictions could be replaced with other less restrictive alternatives. For example, Epic Games proposed a "notarization model"—a tool that could perform automated security checks that "notarize" apps as fit for the App Store.[112] The court rejected this proposal because it did not allow for app review without imposing additional costs on Apple. Epic Games, thus, did not meet its burden to show that such alternatives were "virtually as effective" as Apple's current contracting methods.[113] Because Epic Games was unable to demonstrate an acceptable less restrictive alternative, the court found that Apple's conduct did not violate the Sherman Act.[114] However, the district court enjoined Apple from using antisteering

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108. *See id.* at 1000–01, 1037 n.606.

109. *See id.* at 1002–05, 1038–40.

110. *See* Epic Games, Inc. v. Apple, Inc., 559 F. Supp. 3d 898, 1002–03 (N.D. Cal 2021).

111. *See id.* at 1002–04. The court agreed with Apple that these measures could only be effectuated through human review of apps to check for security concerns, rather than through automated algorithmic review, as proposed by Epic Games. *See id.* at 1004.

112. *See id.* at 1008. The court noted that the notarization model was a "particularly compelling" alternative because Apple had already adopted that model for their desktop computer app review process and had considered using that model for its mobile iOS distribution. *See id.* at 1008–09. Additionally, the court determined that the notarization model would allow Apple to "continue performing app review even if distribution restrictions were loosened." *See id.* at 1008.

113. *Id.* at 1041 (quoting *In re* Nat'l Collegiate Athletic Ass'n Athletic Grant-in-Aid Cap Antitrust Litig., 953 F.3d 1239, 1260 (9th Cir. 2020)).

114. *See id.* There was no discussion of the fourth step of the rule of reason in the district court opinion, and the court referred to the less restrictive alternatives step as the "last step" in the analysis. *See id.* at 1040. The judge noted, however, that "[a]ntitrust law protects competition and not competitors[, and that c]ompetition results in innovation and consumer satisfaction and is essential to the effective operation of a free market system." *Id.* at 921. The district court also avoided deciding whether the per se standard or rule of reason analysis should control the court's analysis of the tying claims because the App Store and the IAP were not separate products that could be tied. *See id.* at 1046.

in future contracting, given that its antisteering practices were "unfair" and violative of the UCL.[115]

2. *Appellate Review Adopts Tech-Tying Rule of Reason and Fourth-Step Balancing*

The Ninth Circuit published a panel opinion in April 2023, affirming in part the district court's judgment against Epic Games on its Sherman Act claims given Epic Games' inability to proffer viable, less restrictive alternatives.[116] Despite the "practical limits of judicial administration" when evaluating proposed alternatives, the court noted that courts can and should impose less restrictive alternatives as injunctive relief.[117]

The Court of Appeals disagreed with the trial court, however, which had said that there was no need to decide whether Epic Games' tying claim fit under the per se or rule of reason standard.[118] Instead, for the first time, the Ninth Circuit held that tying claims in the technology and software context should be analyzed under the rule of reason standard.[119] The court stated that per se condemnation is "inappropriate" in the context of a software provider hosting a platform for third-party applications.[120] Citing the "pervasively innovative character" of digital platforms and software markets, the court adopted the rule

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115. *See id.* at 1056.

116. *See* Epic Games, Inc. v. Apple, Inc., 67 F.4th 946, 966 (9th Cir. 2023). The opinion reiterated that, while Epic Games was able to show that Apple's business practices were anticompetitive, Apple had put forth viable procompetitive justifications, and Epic Games failed to propose viable less restrictive alternatives to Apple's restrictions. *See id.* at 983, 993. Since Epic Games' tying and monopoly maintenance claims were "repackaging" of Epic Games' general Sherman Act § 1 claim, all Sherman Act claims failed on the same grounds. *See id.* at 998; *see also infra* Part II.C.2–3.

117. *See Epic Games*, 67 F.4th at 990 (quoting Nat'l Collegiate Athletic Ass'n v. Alston, 594 U.S. 69, 102 (2021)).

118. *See id.* at 996; *see also* Epic Games, Inc. v. Apple, Inc., 559 F. Supp. 3d 898, 1046 (N.D. Cal. 2021) ("[T]he parties dispute whether the *per se* analysis or the rule of reason analysis should control the Court's analysis. The Court need not decide this dispute. Epic Games' claim fails under either framework. . . ."). The Court of Appeals found that the district court erred in determining that the App Store and IAP were not two separate products, which is a prerequisite element for tying claims. *See Epic Games*, 67 F.4th at 994–95.

119. *See Epic Games*, 67 F.4th at 998.

120. *Id.* at 997 (citing U.S. v. Microsoft Corp., 253 F.3d 34, 89 (D.C. Cir. 2001)). Because the court did not have "considerable experience" with Apple's practice of tying IAP to the App Store, nor the "level of confidence needed," it could not classify Apple's behavior as a per se violation. *See id.* at 997 (quoting Broad. Music, Inc. v. Columbia Broad. Sys., Inc., 441 U.S. 1, 9 (1979)).

of reason standard out of concern that tech-tying may produce efficiencies that are novel to courts.[121]

The Ninth Circuit also held that even when a plaintiff fails to carry its step-three burden to establish a viable, less restrictive alternative, lower courts must proceed to a fourth step: a totality of the circumstances balancing stage.[122] In applying fourth-step balancing, however, the Court of Appeals acknowledged that "this will require nothing more than . . . briefly confirming the result suggested by a step-three failure."[123] It then proceeded to determine, without much analysis, that the district court's failure to balance at the fourth step was harmless error because the district court had "satisfied [its balancing] *obligation*."[124]

3. *The Court of Appeals Confirms Apple's Practices Were Unfair*

The Ninth Circuit confirmed that Epic Games suffered an injury pursuant to the California UCL's "unfairness" prong and upheld the injunction prohibiting the use of the antisteering provision.[125] The court expressly affirmed UCL liability, but not liability under the Sherman Act.[126] Because the antisteering provisions decreased consumer information, Apple's DPLA "enabl[ed] supracompetitive profits" and "result[ed] in decreased innovation."[127] Apple not only controlled the "avenues" for developers' attempts to increase output, but also "act[ed] *anticompetitively* by blocking developers from using [push notifications and email outreach] to Apple's own unrestrained gain."[128]

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121. *Id.* at 997 (citing *Microsoft Corp.*, 253 F.3d at 93). This follows the trend of many courts recognizing that many arrangements in the software industry have intrinsic procompetitive justifications. *See infra* Part II.C.2.

122. *See* Epic Games, Inc. v. Apple, Inc., 67 F.4th 946, 993–94 (9th Cir. 2023).

123. *Id.* at 994.

124. *Id.* (emphasis added).

125. *See id.* at 999. The UCL bans activity that "threatens an incipient violation of an antitrust law, or violates the policy or spirit of one of those laws because its effects are comparable to or the same as a violation of the law," or "otherwise significantly threatens or harms competition." *See id.* at 1000 (quoting Cel-Tech Commc'ns, Inc. v. L.A. Cellular Tel. Co., 973 P.2d 527, 565 (Cal. 1999)).

126. *See id.* at 999–1001.

127. *Id.* at 1001.

128. Epic Games, Inc. v. Apple, Inc., 559 F. Supp. 3d 898, 1055 (N.D. Cal. 2021) (emphasis added); *see also* Epic Games, Inc. v. Apple, Inc., 67 F.4th 946, 1001 (9th Cir. 2023).

By characterizing Apple's antisteering provision as violative of the UCL on these grounds, the court suggested that Apple's conduct *functionally* results in supracompetitive pricing and decreased output—two tell-tale signs of a Sherman Act violation.[129] While the court did not find a Sherman Act violation, at a minimum, they seem to have found its shadow.

C. THE NEW, IMPROBABLE LANDSCAPE OF ANTITRUST UNDER THE RULE OF REASON

This section explores various analytical flaws underpinning the rule of reason in software contexts. As a preliminary matter, Part II.C.1 echoes empirical concerns that the rule of reason has become an unreliable legal standard to assess liability. Part II.C.2 considers the consequences of an emerging trend of utilizing enhancing privacy and security as procompetitive rationales in tech antitrust. Part II.C.3 questions the workability of using less restrictive means analysis as the dispositive factor in rule of reason analysis. Part II.C.4 reprises these issues in the context of *Epic Games*.

1. *The Rule of Reason as an Error-Prone Tool*

In theory, the rule of reason is an ideal judicial model. The standard invokes the adversarial process inherent to the judicial system, affords parties with the opportunity to present a voluminous series of facts, and requires ample proof before condemning business conduct. But there is at least one problem with the analysis: "Plaintiffs almost never win under the rule of reason."[130] A study of modern federal antitrust suits shows that defendants prevail under the rule of reason in 99.5% of cases, which is startling when one considers that most forms of challenged conduct are judged under this standard today.[131]

Presuming that rule of reason analysis is an effective way to determine liability, this statistic would suggest that there is very

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129. *See Epic Games*, 67 F.4th at 1000–01. These two results are considered indicia of anticompetitive markets and antitrust violations. *See* AREEDA ET AL., *supra* note 12, at 7–8.

130. Carrier, *Empirical Update*, *supra* note 43, at 830.

131. *See id.* This study reviewed hundreds of federal antitrust cases from 1977–1999 and then updated its study in 2007 to include an additional decade of sample cases. *See id.* at 827–28.

rarely unjustifiable anticompetitive conduct in modern business, that litigants are almost always picking the wrong battles, or that practically every claim is unmeritorious.[132] The more likely reality is that the rule of reason standard in its current format is unable to achieve its lofty goal of sifting through the evidence to decide the correct outcome.[133] The problem lies primarily in the increasing acceptance of procompetitive justifications and fastidious judicial scrutiny of less restrictive alternatives, both of which are particularly notable in high-tech antitrust litigation.[134]

2. *The Increasing Acceptance of Procompetitive Justifications in Tech Markets*

Tech defendants have found compelling arguments to rebut antitrust allegations, offering the existence of "stricter privacy controls" and enhanced security measures as procompetitive justifications for their allegedly anticompetitive behavior.[135] While a certain subset of consumers presumably *do* make purchase decisions based on a device's data privacy and security settings, recent antitrust cases have increasingly used such concerns to block allegations of anticompetitive behavior.[136] As Erika Douglas and Sammi Chen note, courts have largely credited procompetitive arguments based on the "wide-ranging and often amorphous concept" of privacy and security.[137] Thus, defendants can exploit the procompetitive rationale prong to "evade alleged misconduct"

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132. *See* Jesse W. Markham, Jr., *Sailing a Sea of Doubt: A Critique of the Rule of Reason in U.S. Antitrust Law*, 17 FORDHAM J. CORP. & FIN. L. 591, 628–29 (2012) ("The elephant in the room is the fact that plaintiffs rarely . . . win rule of reason cases. . . . [C]ase law applying the rule of reason [has] . . . failed to live up to its promise of a transparent body of decisional law. . . .").

133. Judge Richard Posner remarked in 1977 that the rule of reason "is little more than a euphemism for nonliability." Richard A. Posner, *The Rule of Reason and the Economic Approach: Reflections on the* Sylvania *Decision*, 45 U. CHI. L. REV. 1, 14–15 (1977). This statement, made at a time when many more antitrust cases were judged under the per se standard, is even more compelling today. *See supra* Part I.B.2.

134. *See infra* Parts II.C.2–3.

135. *See* Sammi Chen, *The Latest Interface: Using Data Privacy as a Sword and in Antitrust Litigation*, 74 HASTINGS L.J. 551, 554 (2023). At the same time, technology companies incorporate the collection and sale of user's data as a major component of their business strategy. *See id.* at 554–55.

136. *See id.* at 555.

137. Erika M. Douglas, *Data Privacy as a Procompetitive Justification: Antitrust Law and Economic Goals*, 97 NOTRE DAME L. REV. REFLECTION 430, 430–31, 457 (2021) ("[M]obile application giants are arguing that online competition must be sacrificed to protect their users' data privacy.").

and "justify anti-competitive conduct."[138] Historically, antitrust law credits *economic* justifications when the defendant can show that the firm's challenged conduct is likely to lower prices or increase interbrand competition.[139] Additionally, antitrust law generally disfavors procompetitive rationales based on noneconomic effects.[140] Courts have been clear that firms cannot defend unlawful restraints based on broader social or political concerns, as these justifications are "nothing less than a frontal assault on the basic policy of the Sherman Act."[141]

In *Epic Games*, Apple presented a "broader view" of privacy and security concerns, detailing the *social* harms that occur when an "app targeted to children asks for a home address . . . [and] microphone and camera access," an app exposes users to pornography or repeated app-crashing "endangers offline safety."[142] By emphasizing its "renowned privacy protections" and reputation as a privacy-forward company, Apple convinced the court that its privacy concerns were viable procompetitive business justifications.[143] Apple tenuously claimed that because it "created a trusted app environment, users make greater use of their devices," which leads to increased consumer appeal despite a lack of strong evidence that its privacy efforts would actually lead to procompetitive results.[144] Such arguments are not a "properly cognizable justification in antitrust law" unless the defendant can demonstrate—with sufficient evidence—that such enhanced

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138. Chen, *supra* note 135, at 554–55.

139. *See* Ulrich, *supra* note 85, at 110. The Supreme Court has used an "efficiencies-focused approach" in assessing whether to give weight to a defendant's purported procompetitive justification, and consumer welfare and market efficiency are discussed heavily in this analysis. *See id.* at 110–11.

140. *See* Douglas, *supra* note 137, at 440.

141. Nat'l Soc'y of Pro. Eng'rs v. United States, 435 U.S. 679, 695 (1978) (rejecting defendant's argument that concerns over the safety of public infrastructure projects could serve as a procompetitive rationale).

142. Epic Games, Inc. v. Apple, Inc., 559 F. Supp. 3d 898, 1002–03 (N.D. Cal. 2021). Apple explained that their business model relies less on collecting user data than those of other major tech firms like Google and Meta, and argued that privacy is a significant reason many consumers choose Apple products. *See id.* at 1005–07. Most of Apple's evidence relied on internal surveys that pointed to the fact that consumers like Apple's privacy settings, a defensive move that "makes it difficult" for competitors to rebut arguments that privacy justifies their distribution restrictions. Chen, *supra* note 135, at 574.

143. Epic Games, Inc. v. Apple, Inc., 67 F.4th 946, 987–89 (9th Cir. 2023).

144. *Id.* at 987; *see also* Douglas, *supra* note 137, at 445 (arguing that courts "stretc[h] precedent" and rely on weak evidence to find privacy justifications); *see also* Ulrich, *supra* note 85, at 138 (reasoning that digital platform defendants must more clearly "enunciate the efficiency being asserted" and "substantiate that efficiency with more fulsome record evidence").

consumer appeal actually creates stronger competition in the form of increased output, innovation, or consumer surplus.[145] Instead, Apple's arguments were almost taken at their word, with no demonstrated link between privacy and security rationales and increased interbrand competition.[146]

Epic Games demonstrates that a court's acceptance of privacy and security concerns can provide a readily available bulwark for tech defendants. In an antitrust milieu in which courts already "tend to be fairly quick to accept the justifications proffered by defendants," broad acceptance of business justifications surrounding privacy and security further expands the rule of reason's "large loophole for platform owners."[147] As the overbroad definition of cognizable procompetitive justifications bolsters the tech defendant's antitrust toolkit, platform owners become bolder in their exclusion of competitors from their walled gardens.[148] The threat of litigation is only a mild deterrence.

3. *The Herculean Less Restrictive Alternatives Requirement*

Because defendants can readily justify their conduct as procompetitive, the less restrictive alternatives analysis takes on an outsized role in rule of reason analysis.[149] Given judicial

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145. Douglas, *supra* note 137, at 452, 454–55.

146. *See id.* at 454–55 ("[T]he court accepts Apple's interbrand competition justification in just one paragraph. . . . No economic evidence was provided to substantiate the effect of Apple's privacy protections."). Privacy and security *could* be valid justifications, however, if defendants demonstrate their usage is actually linked to increased competition in the marketplace. *See* United States v. Microsoft Corp., 253 F.3d 34, 66 (D.C. Cir. 2001) (establishing that rationales for alleged restrictions are only cognizable when they are substantiated by evidence suggesting some sort of economic benefit).

147. Douglas, *supra* note 137, at 437–38; *see also* Josh Baskin, *Competitive Regulation of Mobile Software Systems: Promoting Innovation Through Reform of Antitrust and Patent Laws*, 64 HASTINGS L.J. 1727, 1735–36 (2013) (internal citations omitted) ("[A] Court's unwillingness to find a tying violation in light of a valid business justification [means that] . . . [i]n essence, Apple could block any software that it feels competes with one of the core features of iOS.").

148. *Epic Games*' acceptance of procompetitive justifications illustrates broader innovation-chilling concerns that dominate antitrust's current underenforcement ethos. *See supra* Part I.B.1.

149. *See* Feldman, *The Misuse*, *supra* note 51, at 610 (describing how rule of reason analysis for allegations of unlawful arrangements focuses primarily on the less restrictive alternative inquiry). This is exacerbated in jurisdictions that do not require an explicit balancing stage in the rule of reason, as courts are relying primarily on less restrictive alternatives to determine case outcomes. *See* Hemphill, *Alternatives*, *supra* note 55, at 930–31 ("Such a truncated analysis threatens to insulate conduct from effective antitrust review, particularly when the anticompetitive effect is large and the procompetitive effect is small."); Newman, *supra* note 69, at 693.

apprehension to interfere with business efficiency and innovation, courts have become "strikingly narrow" in their acceptance of less restrictive alternatives.[150] Not only does a plaintiff's proposed alternative have to be "substantively" less restrictive in the Ninth Circuit, the alternative must also be "virtually as effective" as the status quo, avoid creating additional costs for the defendant, and be sufficiently developed to allow a court to assess its feasibility.[151] In practice, less restrictive alternatives are difficult to shape and are often rejected because they may be less effective, more expensive to implement, or too speculative.[152] Assuming that businesses have already opted for the most efficient business decision, less restrictive alternatives are almost definitionally less efficient because they almost always impose higher costs.[153]

The less restrictive alternatives inquiry condones business conduct that is the most efficient, profit-maximizing option; any other alternative will likely fail to meet the rule of reason's requirements.[154] At this stage, the rule of reason fails to "answer the basic question raised by Section 1 of the Sherman Act" because the alternatives prong acts as a test of efficiency, not a test of legality.[155] The Sherman Act is designed to outlaw certain conduct, not maximize firm output nor correct inefficient business decisions.[156] Thus, the current less restrictive alternative standard is not only too onerous on the plaintiff, but it is also a red herring for the court.[157]

Epic Games was not able to provide a satisfying alternative to Apple's thorough, manual app review process.[158] While Epic Games' alternative proposal "would clearly be *virtually as effective* in achieving Apple's security and privacy rationale" because it would "contain all elements of Apple's current model," the court

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150. Hemphill, *Alternatives*, *supra* note 55, at 929.
151. Epic Games, Inc. v. Apple, Inc., 67 F.4th 946, 990 (9th Cir. 2023) (quoting Cnty. of Tuolumne v. Sonora Cmty. Hosp., 236 F.3d 1148, 1159 (9th Cir. 2001)).
152. *See* Hemphill, *Alternatives*, *supra* note 55, at 955 (noting that it is "well recognized" that "perhaps most LRAs are less effective than the challenged conduct") (cleaned up).
153. *See id.* at 982.
154. *See id.* (summarizing criticisms of the less restrictive alternatives prong related to its demanding burden).
155. Feldman, *The Misuse*, *supra* note 51, at 586.
156. *See id.* at 587–88 ("[T]he less restrictive alternative [prong] . . . changes the fundamental purpose of the Section 1 analysis . . . to an ex post, ad hoc regulator and micro-manager of procompetitive business decisions.").
157. *See id.* at 586–88.
158. *See* Epic Games, Inc. v. Apple, Inc., 67 F.4th 946, 991 (9th Cir. 2023).

nonetheless rejected it.[159] Because Epic Games failed to detail fully how the model would allow Apple to recoup costs for lending its intellectual property out to developers or offset additional in-house costs, their alternative model was not "substantially" less restrictive.[160] Epic Games expressly indicated that Apple could charge a licensing fee in the notarization model to compensate for adopting the alternative.[161] The panel, however, determined that Epic Games did not provide Apple with enough concrete guidance on how to collect the proposed licensing fee or how to structure external fee agreements going forward.[162] In any event, the court noted that such less restrictive alternatives were not suitable because they would impose both increased "monetary and time costs" on Apple.[163]

Epic Games' less restrictive alternative analysis represents an overly burdensome standard imposed on antitrust plaintiffs.[164] Although the court emphasized the need to limit judicial second-guessing of Apple's business judgment, its analysis required speculating about Apple's bottom-line costs and creating hypothetical adjustments to Apple's day-to-day operations.[165] Less restrictive alternative analysis is at odds with the usual playbook for statutory law, in which a court's role is to decide whether conduct is unlawful, imposing liability regardless of whether

159. *Id.* at 992 (cleaned up) (emphasis added).

160. *Id.* Even such a showing would not be sufficient to establish an alternative. According to the court, Epic Games would still have to show how Apple could be compensated at parity if the court were to require Apple to use the proposed alternative method. *See id.*

161. *See id.*

162. *See id.*

163. *Id.* at 993. Because the less restrictive alternative must be as effective *in every respect* as Apple's current model, after the court determined that Epic Games could not show alternatives that would uphold Apple's intellectual property goals, it did not credit Epic Games' less restrictive alternatives that could have satisfied Apple's privacy and security rationales. *See id.* at 993 n.18.

164. *See* Feldman, *The Misuse*, *supra* note 51, at 586. Under this model, the less restrictive alternative prong transforms the rule of reason to a search for "the most net procompetitive restraint possible, meaning the market must be better off with the restraint than it would have been with other restraints." *See id.*

165. *See* Epic Games, Inc. v. Apple, Inc., 67 F.4th 946, 990 (9th Cir. 2023). For a discussion of the reasons behind such business-judgment deference, see Frank H. Easterbrook, *On Identifying Exclusionary Conduct*, 61 NOTRE DAME L. REV. 972, 975 (1986) ("[Business] explanations tend to be vague, hard to verify, even damning."). Modern less restrictive alternatives analysis, however, anatomizes the minute business affairs of a company, requiring a plaintiff to investigate the defendant's processes in detail and a judge to "conjure up" less restrictive alternatives. Feldman, *The Misuse*, *supra* note 51, at 617–18. Additionally, district courts have "seized on the invitation to engage in the dangerous second-guessing invited by the circuit courts." *Id.* at 618.

liability is harmful to the defendant's bottom line.[166] The current standard—where legality turns on the plaintiff's ability to formulate alternative means by which the defendant can achieve maximum efficiency—is incongruous with statutory schema and threatens antitrust underenforcement.[167]

Unlike other Sherman Act claims, tying claims require defendants—not plaintiffs—in the Ninth Circuit to bear the burden of showing the *absence* of a viable less restrictive alternative. Courts have been historically receptive to finding less restrictive alternatives for tying claims.[168] If there is any less restrictive manner by which the defendant can proceed without the alleged tying arrangement, precedent suggests that a court should impose liability based on that alternative.[169] Because the court double-dipped on its analysis of Epic Games' general Section 1 Sherman Act claims and Epic Games' tying claims, the panel did not discuss alternatives with respect to Apple's alleged tying conduct, in which Apple—not Epic Games—would bear the burden to show the absence of any less restrictive alternative to the DPLA.[170]

166. For a hyperbolized example, consider that insider trading is also more profitable for the defendant. Yet it would not make sense to determine the legality of insider trading based on whether it was more profitable for the trader to continue trading on nonpublic information.

167. *See* Benjamin M. Fischer, *The Rise of the Data-Opoly: Consumer Harm in the Digital Economy*, 99 WASH. U. L. REV. 729, 738–39 (2021) (describing how efficiency and profit maximizing concerns have resulted in "decades" of underenforcement). *But see* Paul L. Joskow, *Transaction Cost Economics, Antitrust Rules, and Remedies*, 18 J.L. ECON. & ORG. 95, 98 (2002) (arguing that it is not "feasible" nor "desirable" to ask firms to change their operations).

168. *See, e.g.*, Image Tech. Serv., Inc. v. Eastman Kodak Co., 903 F.2d 612, 618–19 (9th Cir. 1990) ("To prevail . . . [the defendant] would have to prove that its tying arrangement is the only way that . . . service can be assured.") (internal citations omitted) (emphasis added); Mozart Co. v. Mercedes-Benz of N. Am., Inc., 833 F.2d 1342, 1349 (9th Cir. 1987) ("To exonerate a franchisor's tie-in . . . from the antitrust law, there must be a finding that no less restrictive alternative exists."); Hemphill, *Alternatives*, *supra* note 55, at 980.

169. *See* Donald F. Turner, *The Validity of Tying Arrangements Under the Antitrust Laws*, 72 HARV. L. REV. 50, 59 (1958). When courts assessed tying claims under a modified per se standard, the less restrictive alternatives allowed the defendant to "soften and provide an exception to the otherwise rigid per se rule." *See* Feldman, *The Misuse*, *supra* note 51, at 578.

170. *See Epic Games*, 67 F.4th at 998. Thus, Epic Games' claim may have fared better with a separate less restrictive alternative tying analysis in which the defendant carries the burden of persuasion. *See* Hemphill, *Alternatives*, *supra* note 55, at 980–82.

4. *Apple's Low-Hanging Fruit*

Despite indicators of Sherman Act liability, the court enjoined Apple's antisteering provisions only on state law grounds.[171] But in its discussion of UCL liability, the court seemed constrained by the confines of the rule of reason amidst such strong showings of anticompetitive conduct.[172] This outcome could be seen as an exercise of judicial restraint.[173] More likely, however, this ruling represents broader structural flaws in the rule of reason. Especially in the context of innovative tech markets, it may simply be too difficult for plaintiffs to prevail under the rule of reason, even when the court finds that the defendant's conduct "significantly threatens or harms competition"—as it did in *Epic Games*.[174]

Epic Games' application of the rule of reason to tech-tying claims marks another significant example of the jurisprudential shift away from categorical presumptions in antitrust law.[175] This shift continues to fuel the "vacuum of diluted policy and nonenforcement" that allows large technology companies to remain "virtually unchecked."[176] Setting aside the doctrine's

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171. *See* Epic Games, Inc. v. Apple, Inc., 67 F.4th 946, 998 (9th Cir. 2023).

172. *See id.* at 966. As both the district court and Court of Appeals found merit in the Epic Games' arguments that the antisteering provision's created supracompetitive profits and decreased innovation, it is unlikely that the denial of Sherman Act liability can be chalked up to Apple making better legal arguments. *See id.*

173. The district court explicitly made the factual finding that the antisteering provisions can be severed from the DPLA "without any impact on the integrity of the ecosystem," and noted that "while [Epic Games'] strategy of seeking broad sweeping relief failed, narrow remedies are not precluded." *See* Epic Games, Inc. v. Apple, Inc., 559 F. Supp. 3d 898, 1054–55 (N.D. Cal. 2021). If the district court found that the antisteering provision was anticompetitive, and issued an injunctive relief preventing Apple from using the antisteering provision, this suggests that the injunction—the DPLA without the antisteering provision—could have been a viable less restrictive alternative.

174. 67 F.4th at 1000 (quoting Cel-Tech Commc'ns, Inc. v. L.A. Cellular Tel. Co., 973 P.2d 527, 565 (Cal. 1999)). This language—aligned to UCL doctrine—anticipates that there are some claims that will violate the policy behind antitrust law but will not lead to federal Sherman Act liability. *See id.* Consequentially, plaintiffs should not rely on California state law for federal antitrust enforcement.

175. *See* Edwin J. Hughes, *The Left Side of Antitrust: What Fairness Means and Why it Matters*, 77 MARQ. L. REV. 265, 265 (2009) (noting that "[p]laintiffs, to their regret, have recently found many new ways to lose an antitrust case" because the structure of antitrust analysis "doom[s] most antitrust claims").

176. *See* Samuel T. Alen, *Too Big To Nail: Legislative Solutions to Big Tech Monopolies in an Age of Relaxed Antitrust Enforcement*, 55 SUFFOLK U. L. REV. 531, 532–33 (2022) ("[S]eries of court decisions . . . veer[ing] away from strict enforcement has led to tech giants' expansion at the expense of consumers, businesses, and society . . . antitrust law has failed to meaningfully correct their harmful anticompetitive conduct.").

knotty acceptance of standards over bright-line rules, the rule of reason's burden-shifting process exacerbates antitrust's underenforcement issues. The burden-shifting framework has created a web of assessments that all but guarantee nonliability in litigation.[177] Faced with the current state of antitrust law, future litigants are left wondering: In what scenarios can a plaintiff possibly prevail under the rule of reason?

III. ASSERTING THE FOURTH STEP: REINJECTING NONECONOMIC ANTITRUST RATIONALES

Keeping in mind *Epic Games*' cautious reinforcement of judicial balancing, Part III looks ahead to the future of the rule of reason in high-tech antitrust litigation. Part III.A argues that courts should adopt a capacious and transparent balancing analysis to resolve close calls in antitrust litigation, despite the drawbacks inherent in judicial balancing. Part III.B offers a set of three noneconomic questions to ground balancing efforts intended to counteract relaxed antitrust enforcement. This Part also proposes a roadmap of sub-questions courts should consider for antitrust balancing.

A. APPLICATION OF THE FOURTH STEP: BALANCING AND WHY IT MATTERS

1. *Balancing as a Viable Method for Judicial Decision-Making in Antitrust Law*

Judicial balancing is an oft-criticized practice in antitrust law.[178] Jurists argue that courts are unable to balance conflicting economic testimony, that competing factors are hard to quantify or weigh, and that rules and presumptions are more efficient methods to manage the density of antitrust litigation.[179] Additional balancing efforts could lead to further confusion and, thus, should

177. *See supra* Part I.B.1.
178. *See supra* Part I.A.3.
179. *See* Markham, *supra* note 132, at 658; Alan Devlin & Michael Jacobs, *Error*, 52A WM. & MARY L. REV. 75, 89 (2010); HERBERT HOVENKAMP, ANTITRUST LAW 371 (3d ed. 2011) ("[The] set of rough judgments we make in antitrust litigation does not even come close to this 'balancing' metaphor.").

be avoided.[180] Others argue that courts already implicitly balance competing interests throughout the burden shifting framework, so it is unnecessarily formalistic to require an explicit balancing stage.[181]

While these are legitimate reasons to hesitate, solutions that advocate for abandoning the rule of reason simply ignore antitrust law's resounding preference for judicial standards. Regardless of whether per se illegality is ultimately the better path for antitrust law, modern courts have consistently rejected categorical presumptions.[182] Instead, they have adopted the rule of reason standard as the default framework to assess most antitrust claims.[183] Therefore, this Note argues that it is increasingly important to work *within* this framework to ensure that antitrust law offers an even-handed structure and process.[184]

Many areas of the law require judicial balancing.[185] The law recognizes that judges are often given difficult tasks without perfect outcomes and that error is inevitably baked into the

180. *See* Herbert Hovenkamp, *Antitrust Balancing*, 12 N.Y.U. J.L. & BUS. 369, 370 (2016) ("'Balancing' requires values that can be cardinally measured and weighed against each other. The factors that are supposedly balanced in Sherman Act cases almost never fit this description.").

181. *See supra* Part I.A.3. There is no inherent connection between the rule of reason and judicial methods that proves the existence of implicit balancing. *See* Thomas C. Arthur, *A Workable Rule of Reason: A Less Ambitious Role for the Federal Courts*, 68 ANTITRUST L.J. 337, 367 (2000) (noting that courts "avoid actual balancing" through their burden shifting framework).

182. *See, e.g.*, Ohio v. Am. Express Co., 585 U.S. 529, 540–42 (2018); Leegin Creative Leather Prods., Inc. v. PSKS, Inc., 551 U.S. 877, 898–99 (2007); Continental T.V., Inc. v. GTE Sylvania, Inc., 433 U.S. 36, 49–50 (1977).

183. *See* Weg, *supra* note 65, at 1538 (arguing that the Supreme Court has "whittled away" categorical antitrust rules and modern courts invariably prefer the rule of reason). Given the shrinking pool of per se claims, hostility toward categorical presumptions, and the increasing complexity of economic methodology, courts have consistently reiterated that they are uncomfortable with applying per se illegality absent an obvious, naked restraint on trade. *See, e.g.*, Devlin & Jacobs, *supra* note 179, at 77–78.

184. *See* Louis Kaplow, *Balancing Versus Structured Decision Procedures: Antitrust, Title VII Disparate Impact, and Constitutional Law Strict Scrutiny*, 167 U. PA. L. REV. 1375, 1385 (2019) ("[H]owever great the challenges [of applying standards], something akin to balancing is the only plausible way to proceed when there are competing considerations, each sometimes powerful enough relative to the other to be decisive."). If courts are to rely more on the rule of reason, it must become a more reliable gauge of liability. *See* Devlin & Jacobs, *supra* note 179, at 77–78 (arguing that antitrust litigation has become an inaccurate determinant of actual culpability due to the policy preference of avoiding false positives).

185. *See* Iddo Porat, *The Dual Model of Balancing: A Model for the Proper Scope of Balancing in Constitutional Law*, 27 CARDOZO L. REV. 1393, 1398–1400 (2006) (describing balancing as the primary mode of decision making in multiple areas of Constitutional and statutory law).

judicial system. Courts should not abdicate their crucial role in interpreting and developing antitrust jurisprudence.[186]

2. *Epic Games* as a Building Block for Prospective Rule of Reason Analysis

Epic Games' adoption of fourth-step balancing only calcifies antitrust law's preference for standards in an exceedingly complicated body of law.[187] Recognizing this, the Ninth Circuit expressed its concern that requiring a formal balancing stage after previous steps in the burden shifting model would be redundant.[188] In its view, the fourth step could be a simple procedural checkpoint to confirm that previous analysis has not misled the court.[189] But balancing does not have to be so limited. Beyond the court's goal of "briefly confirming the result suggested by a step-three failure," the fourth step could be an opportunity for judges to weigh—and litigants to argue—underserved substantive points.[190]

In justifying its adoption of fourth-step balancing, the Ninth Circuit attempted to avoid "embarrass[ing] the future" by imposing static boundaries on rule of reason analysis in *Epic Games*.[191] The court noted that the Sherman Act is a "flexible

186. *See* Arthur, *supra* note 181, at 367; *see also* Schrepel, *supra* note 18, at 119 ("In reality, the complexity of antitrust law should encourage judges to work harder to perfect antitrust jurisprudence. . . .").

187. *See* Stucke, *Reconsidering*, *supra* note 30, at 556–57 (noting that judicial rejection of presumptions is making private antitrust liability for future cases highly improbable); Markham, *supra* note 132, at 627–31 (reasoning that balancing exercises abandon categorical presumptions of illegality).

188. *See* Epic Games, Inc. v. Apple, Inc., 67 F.4th 946, 994 (9th Cir. 2023) ("Nor is it evident what value a balancing step adds. Several *amici* suggest that balancing is needed to pick out restrictions that have significant anticompetitive effects but only minimal procompetitive benefits. But the three-step framework is already designed to identify such an imbalance. . . .").

189. The view that balancing should be a quick gut-check adopts the "rote checklist" approach—one that the Supreme Court advises against—and reinforces the balancing stage's lack of value to the overall analysis. *See* Nat'l Collegiate Athletic Ass'n v. Alston, 594 U.S. 69, 96–97 (2021).

190. *See Epic Games*, 67 F.4th at 994. The panel in *Epic Games* characterized *County of Tuolumne*'s balancing stage as abbreviated, *see id.*, although that case was decided on summary judgment posture in response to allegations of an antitrust violation in a physical product market, which demands simpler analysis than do claims made in digital markets, *see* Cnty. of Tuolumne v. Sonora Cmty. Hosp., 236 F.3d 1148, 1157, 1160 (9th Cir. 2001). When arguments over anticompetitive effects and the procompetitive justifications are not equally compelling, balancing is unnecessary as burden shifting has already successfully filtered out the claim. *See* Hovenkamp, *Rule of Reason*, *supra* note 40, at 134–35.

191. *See Epic Games*, 67 F.4th at 994.

statute that has and will continue to evolve to meet our country's changing economy."[192]

Using *Epic Games* as a starting point, using a totality-of-the-circumstances balancing technique can avoid single-minded concern over the consumer-welfare standard; courts can recalibrate the rule of reason to foundational principles of antitrust law.[193] Although the Ninth Circuit's adoption of explicit balancing was tentative, it may set the stage for improving rule of reason jurisprudence—even if it will take time for other courts to follow.

B. RECALIBRATING ANTITRUST'S RATIONALES WITH THREE CAPACIOUS JUDICIAL QUESTIONS

Any reform to the rule of reason must look beyond economic considerations of allocative efficiency and price effects, as these concerns are already accounted for elsewhere in rule of reason analyses.[194] This Note does not attempt to overhaul or save the rule of reason, nor does it attempt to instruct courts on how to balance. Instead, this Note offers a set of three intentionally capacious, noneconomic questions to prime an antitrust court's balancing efforts.[195] These questions, inspired by unfair competition law, attempt to relieve the rule of reason from its constrained burden-shifting structure and combat the current underenforcement of private Sherman Act claims.[196] Once a court

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192. Epic Games, Inc. v. Apple, Inc., 67 F.4th 946, 994 (9th Cir. 2023).

193. Relying on the consumer-welfare standard in antitrust rulings risks statutory misinterpretation and underenforcement. *See supra* notes 23–33 and accompanying text. Thus, the Ninth Circuit's doubling-down on the role of balancing is an opportunity to reframe anticompetitive effects and procompetitive justifications. *See supra* Part II.C.

194. *See* Stucke, *Reconsidering*, *supra* note 30, at 568–69.

195. Considering that antitrust's original goals may even be more important in emerging industries, courts should return to a first-principles approach when applying antitrust law to high-tech markets. *See* Samuel Cote, *Combatting Monopolies in the Digital Age: Translating the Sherman Act from the Industrial Revolution to the Tech Boom*, 54 SUFFOLK U. L. REV. 493, 513 (2021) ("Given the difficulty of enforcing *antitrust* law in an era of rapidly changing economic and technological conditions, courts should first look to the Sherman Act and the legislative intent behind it.").

196. *See* Am. Philatelic Soc'y v. Claibourne, 46 P.2d 135, 139–40 (Cal. 1935) (noting that unfair competition law is designed broadly as to not artificially limit liability to rigid classifications). The UCL itself incorporates balancing, regarding business practices unfair when their harm outweighs their benefits. *See, e.g.*, Swafford v. Int'l Bus. Mach. Corp., 408 F. Supp. 3d 1131, 1151–52 (N.D. Cal. 2019); Crafty Prods., Inc. v. Michaels, Co., 424 F. Supp. 3d 983, 996 (S.D. Cal. 2019); Gemisys Corp. v. Phoenix American, Inc., 186 F.R.D. 551, 564 (N.D. Cal. 1999). There are significant limits to a court's finding of a UCL violation, including a legislature's ability to create safe harbors or overriding exemptions. *See* Kwan

determines that there are both anticompetitive effects and procompetitive justifications for the challenged conduct, the court should import the UCL's broad decision-making ethos into rule of reason balancing, even if the plaintiff cannot proffer a less restrictive alternative.[197]

1. *Question One: Would a Finding of Liability Better Anticipate Incipient Violations of Antitrust Law?*

Unfair competition law prohibits incipient forms of business conduct that do not squarely violate the Sherman Act but threaten to impair competition—for example, bait-and-switch tactics, product disparagement, or false advertising. Courts in this situation can determine that such conduct is unlawful.[198] In reviewing Epic Games' claims under the UCL, the court found a strong connection between antisteering—not presently a Act violation—and conduct that can impair competition. Because antisteering provisions allow firms to more easily charge supracompetitive prices or produce inferior quality, they are unlawful.[199]

This reasoning should be extended beyond state law to counteract current underenforcement realities in federal antitrust law.[200] High-tech antitrust exemplifies how dependence on

v. SanMedica Int'l, 854 F.3d 1088, 1094–95 (9th Cir. 2017). Caselaw rejects attempts to base liability determinations on vague conceptions of what is fair or unfair under the law. *See id.* at 1094.

197. The FTC Act's similar decision-making framework is not a viable substitute for the UCL, as the FTC does not provide for private right of action. *See* 15 U.S.C. §§ 41–58 (1914). Informally importing UCL-like principles into Sherman Act antitrust balancing in private litigation is likely a less intrusive option than statutory revision of the FTC Act, especially as balancing already acts as a "last resort." *See* Hovenkamp, *Rule of Reason*, *supra* note 40, at 132, 134.

198. *See* Fed. Trade Comm'n v. Sperry & Hutchinson Co., 405 U.S. 233, 243–44 (1972); Brown Shoe Co. v. United States, 370 U.S. 294, 322 n.39 (1962). Much of the UCL's framework responds to incipiency doctrine as originally explicated through FTC antitrust cases. *See* Brown Shoe, 370 U.S. at 322 n.39.

199. *See* Epic Games, Inc. v. Apple, Inc., 559 F. Supp. 3d 898, 1057 (N.D. Cal. 2021).

200. *See* Epic Games, Inc. v. Apple, Inc., 67 F.4th 946, 1001 (9th Cir. 2023). The Court of Appeals explicitly rejected the idea that a court's failure to find a Sherman Act violation would preclude a finding of unfair competition. *See id.* Even though it rejected the substance behind Apple's arguments, the court was willing to extend Sherman Act concepts into its UCL analysis, and did not preclude the use of incipiency doctrine for Sherman Act claims. *See id.* at 1002. The district court stated that Sherman Act analysis can "inform the issues relating to anticompetitive and incipient antitrust conduct." *See Epic Games*, 559 F. Supp. 3d at 1036. This suggests that UCL principles could be extended into rule of reason analysis.

prevailing interpretations of competitive effects leads to underenforcement.[201] Recognition of anticompetitive conduct "too often comes too late," causing years of inflated prices, abusive monopolization, and "stalled entry" before the law can adapt.[202] Of course, courts must continue to rely on stare decisis principles, but courts must also be more willing to develop antitrust law in step with the creation of new marketplaces.[203]

It is precisely because of the shifting, innovative nature of digital platforms that judicial understandings of antitrust liability must be more adaptive. Emerging business conduct inherently falls outside of the present or pre-determined boundary of antitrust liability.[204] This is especially crucial when innovative technology is reshaping the very definition of competition and markets themselves.[205] If jurists are right to laud innovation as

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201. *See* Lina Khan, *Amazon's Antitrust Paradox*, 126 YALE L.J. 710, 717 (2017) (arguing that modern antitrust's process of "pegging competition" does not adequately combat the concentration of firms in the digital-platform market). This Note focuses on recent underenforcement in private antitrust litigation, which is distinguishable from—and arguably at tension with—rigorous regulatory enforcement by the Federal Trade Commission and the Department of Justice during the Biden administration. *See* Frank Pasquale & Michael L. Cederblom, *The New Antitrust*, 33 S. CAL. INTERDISC. L.J. 235, 236 (2023) ("The revitalization of competition policy during the Biden administration marks a "New Antitrust," forcing a fundamental rethink of once-venerated nostrums in the field."). *But see* Richard A. Epstein, *The DOJ and FTC's Misguided Attack on Mergers*, 49 J. CORP. L. 275, 276–78 (2024) (explaining that regulatory antitrust enforcement has been too aggressive during the Biden administration).

202. Richard M. Steuer, *Energizing Antitrust; Submission to the Subcommittee on Antitrust, Commercial and Administrative Law*, U.S. HOUSE OF REPRESENTATIVES COMM. ON THE JUDICIARY 11 (Feb. 24, 2020), https://democrats-judiciary.house.gov/uploadedfiles/submission_from_richard_m._steuer.pdf [https://perma.cc/U7PX-A9ZX] [hereinafter Steuer, *Energizing Antitrust*].

203. *See* Elisabeth Bogomolni, *Tackling Big Tech in the United States and the European Union—A Comparison of the DMA and the CALERA*, 54 N.Y.U. J. INT'L L. & POL. 235, 240 (2021) ("The partially outdated antitrust doctrines render current legal foundations ill-suited to effectively tackle antitrust issues associated with Big Tech.").

204. *See* Cote, *supra* note 195, at 513 (tracing the law's inability to redefine anticompetitive behavior and adapt to new antitrust contexts due to its precedential nature).

205. *See* Bogomolni, *supra* note 203, at 238 (noting problems with antitrust's tendency to "operate in an *ex post* manner" instead of "capturing the emergence of self-enhancing power or preventing exclusionary conduct *ex ante*, or in its incipiency") (cleaned up). Adhering to precedent becomes more complicated when market definitions, market power, and exclusionary conduct are constantly reexamined and redefined in tech antitrust. *See* Cote, *supra* note 195, at 513–14. For instance, third-party disintermediation within simultaneous two-sided transaction markets is a fairly new market context. *See id.* But the Sherman Act's vagueness has historically required constant gap-filling to supplement the Sherman Act's indeterminacy. *See* U.S. v. E.I. du Pont de Nemours & Co., 353 U.S. 586, 597 (1957) (describing how the Clayton Act attempts to widen the scope of Sherman Act violations); Arthur, *supra* note 181, at 367.

indicative of a healthy marketplace and allow firms to argue that innovation is procompetitive, the law should likewise "enable judicial tribunals to deal with the innumerable new schemes which the fertility of [one's] invention would contrive."[206] Thus, the rule of reason must not outlaw schemes wholly familiar to—and routinely condemned by—the Sherman Act.

Antitrust statutes further support the proposition that current doctrine should consider future states of competition. Courts can outlaw "attempts" to monopolize under Section 2 of the Sherman Act, conduct that "may" or "tend to" create a monopoly under the Clayton Act of 1914, or mergers that could result in overly concentrated industries.[207] A more flexible balancing stage that probes for incipient forms of anticompetitive conduct may relieve courts from burden shifting's overly restrictive methods.[208] In close cases, antitrust courts should consider (1) whether there are

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206. *See* Cel-Tech Commc'ns, Inc. v. L.A. Cellular Tel. Co., 973 P.2d 527, 540 (Cal. 1999) (quoting American Philatelic Soc'y v. Claibourne, 46 P.2d 135, 140 (Cal. 1935)).

207. *See* 15 U.S.C. §§ 1–2, 12–27. Congress passed the Clayton Act to ban specific forms of anticompetitive conduct like tying, exclusive dealing, and mergers in their incipiency. *See* 15 U.S.C. §§ 12–18. Incipiency doctrine centers around hypothetical states of the market concentration. *See* Richard M. Steuer, *Incipiency*, 31 LOY. CONSUMER L. REV. 155, 158–59 (2019) [hereinafter Steuer, *Incipiency*]. Outlawing "attempts to monopolize" suggests that the framers of the Sherman Act intended to prohibit conduct that has not yet been realized. *See* Spectrum Sports, Inc. v. McQuillan, 506 U.S. 447, 457, 459 (1993). Even when the defendant's conduct does not fit the mold of past outlawed conduct, the Supreme Court has been disinterested in shoehorning the challenged conduct into familiar antitrust categorizations. *See* Fed. Trade Comm'n v. Brown Shoe. Co., 384 U.S. 316, 322 (1966). Because the court in *Brown Shoe Co.* found that the new form of business conduct—a novel quid pro quo refusing to deal with competitive shoe manufacturers in exchange for special contracting benefits particularly advantageous in the shoe manufacturing industry—ultimately conflicted with the Sherman Act's policy, it was unlawful despite not being a traditional tying nor exclusive dealing scheme. *See id.*; *see also* August T. Horvath, *Anticompetitive Practices that May not Violate Traditional Antitrust Laws—Guideline 3: A Practice that is an Incipient Violation of the Sherman or Clayton Acts*, *in* 2 ANTITRUST ADVISER § 10:12 (Irving Scher and Scott Martin eds., 5th ed. 2022) (explaining that courts may hold unlawful business practices that have not previously been held illegal).

208. This Note stops short of arguing that courts should formally adopt incipiency doctrine as it has been applied to merger contexts. Private plaintiffs and courts are not regulators, and this Note does not suggest courts should develop new Sherman Act liability based solely on the threat of incipient violation. To do so would impose liability based on "subjective notions of fairness," which is disallowed by the UCL. Cel-Tech Commc'ns, Inc. v. L.A. Cellular Tel. Co., 973 P.2d 527, 542–43 (Cal. 1999). Due to concerns over unpredictability in business relations, reliance considerations, and the goal of avoiding hastily outlawing conduct, formal adoption of incipiency doctrine for Sherman Act claims would risk overenforcement under some definitions of incipiency. *See* Robert H. Bork & Ward S. Bowman, Jr., *The Crisis in Antitrust*, 65 COLUM. L. REV. 363, 368 (1965) (noting that incipiency "nips" conduct before it develops into a Sherman Act violation). Thus, the better solution is to use quasi-incipiency as a model for judicial reasoning, rather than as a formal outcome-determinative doctrine.

clusters of recent cases challenging similar business conduct not yet deemed unlawful; (2) how courts or regulators have dealt with that conduct; (3) whether the technological context is so new that it could not have been previously deemed unlawful yet poses imminent effects on the marketplace; (4) whether precedent creates an appropriate barometer to each anticompetitive and procompetitive argument; and (5) whether adjusting that barometer through the outcome of the present case would uphold antitrust's enforcement prerogatives.[209]

If performed imprudently, this exercise could lead to antitrust overenforcement. Yet courts would assess these indicators upon reaching the balancing stage, only *after* they have determined that the challenged conduct was anticompetitive.[210] Thus, courts considering incipient antitrust violations are not as much finding new violations of the Sherman Act as they are adjusting current enforcement thresholds for anticompetitive acts in emerging business contexts.[211] While one could argue this is similar to any extension of past precedent to new contexts, antitrust circles should give additional attention to recent trends in technology contexts, as the law has been unable to keep up with high-tech monopolization.[212] Additionally, because the UCL only finds incipient violations when they are "tether[ed]" to legislative policy rationales, there should not be liability at this stage as long as the challenged conduct harmonizes with the Sherman Act's policy goals.[213]

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209. These factors are not meant to be exhaustive nor exclusive. Proximity to other outlawed conduct and overall enforcement trends are salient factors for determining liability in a merger, and can be extended to analysis here. *See* U.S. v. Pabst Brewing Co., 384 U.S. 546, 552–33 (1966) ("We hold that a trend toward concentration in an industry, whatever its causes, is a highly relevant factor. . . ."); U.S. v. Von's Grocery Co., 384 U.S. 270, 276 (1966) (arguing that the "rising tide" of business conduct can help assess legality). There is recent precedent that connects the incipiency doctrine in the context of Clayton Act merger review to Sherman Act rule of reason analysis. *See* ZF Meritor, LCC. v. Eaton Corp., 696 F.3d 254, 327 n.26 (3d. Cir. 2012) (incipiency under the Clayton Act "differs very marginally, if at all" from rule of reason analysis under the Sherman Act); Steuer, *Incipiency*, *supra* note 207, at 163 (lower courts have declared that rule of reason analysis is "indistinguishable" from merger analysis).

210. *See* Hovenkamp, *Rule of Reason*, *supra* note 40, at 131–32. Thus, antitrust jurisprudence will benefit from courts undertaking even a slightly more adaptive mindset when balancing. *See supra* notes 180–188 and accompanying text.

211. *See supra* notes 72–75 and accompanying text.

212. *See id.*

213. Hodsdon v. Mars, Inc., 891 F.3d 857, 866 (9th Cir. 2018); Steuer, *Incipiency*, *supra* note 207, at 155 (explaining that incipiency turns on legislative intent to "satisfy demands that are coming from across the political spectrum to strengthen antitrust enforcement").

2. *Question Two: Would a Finding of Liability Better Uphold the Noneconomic Policies Behind Antitrust Law?*

The *Epic Games* court engaged with antitrust's economic rationales throughout its rule of reason analysis, analyzing how Apple's contracting affected prices, output, efficiency, and innovation in the digital-download ecosystem.[214] But nowhere does the rule of reason require a court to explicitly consider whether the challenged conduct upsets the Sherman Act's noneconomic policy goals.[215] Rule of reason analyses can be flawed when based exclusively on economic rationales, especially because there is no clear consensus on what the consumer-welfare standard actually demands.[216] Business efficiency is *presumed* to increase competition and lower costs for consumers, but it is difficult to measure hypothetical price effects or predict financial consequences of innovation.[217] Additionally, as economic goals focus primarily on short-term market outcomes, exclusive focus on price effects or other immediate economic results can risk misinterpreting overarching statutory schemes.[218]

Antitrust law has never required an exclusively economic analysis.[219] It has other compelling goals, including "an intent to prevent unjust wealth transfers, to secure social values, to curb the political power of trusts, to secure equality of opportunity for every person seeking to engage in trade and to preclude coercion in excluding persons from business."[220] It is naïve to insulate

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214. *See* Epic Games, Inc. v. Apple, Inc., 67 F.4th 946, 983–84, 987, 998–99 (9th Cir. 2023). That the court did not find Apple's antisteering practices unlawful under the Sherman Act may have even been contrary to consumer-welfare goals because *Fortnite* consumers were able to get lower prices for digital *Fortnite* products in marketplaces outside of the App Store. *See id.* at 950–52, 969.

215. *See supra* notes 28–33 and accompanying text.

216. *See* Stucke, *Reconsidering*, *supra* note 30, at 584.

217. *See id.* at 585, 590 (noting that the problem with "efficiency as a normative goal" of antitrust law is that it "does not necessarily promote overall well-being"). Reinforcing efficiency is not equivalent to outlawing unreasonable restraints on trade. *See id.* at 585.

218. *See id.* at 579–82, 585; Robert H. Lande, *Wealth Transfers as the Original and Primary Concern of Antitrust: The Efficiency Interpretation Challenged*, 34 HASTINGS L.J. 65, 89 (1982) ("Congressional distaste for the pricing and output consequences of monopoly pricing must therefore be rooted in other concerns [than allocative efficiency].").

219. *See* John. J. Flynn, *Antitrust Policy and the Concept of a Competitive Process*, 35 N.Y. L. SCH. L. REV. 893, 896 (1990) [hereinafter Flynn, *Concept of Process*] ("Antitrust policy has always been informed by economics, and rightly so . . . But, like any other source of insight, economics must be used reflectively. . . .").

220. John J. Flynn, *The Reagan Administration's Antitrust Policy, 'Original Intent' and the Legislative History of the Sherman Act*, 33 ANTITRUST BULL. 259, 281 (1988) [hereinafter Flynn, *Original Intent*]; *see also* Herbert Hovenkamp, *Antitrust Policy After Chicago*, 84

antitrust law from these politically charged considerations.[221] Instead, fourth-stage balancing should parallel the UCL's "close nexus" inquiry, asking whether the conduct in question directly offends or upholds antitrust's comprehensive legislative goals.[222]

While the district court in *Epic Games* ultimately found that the record in the current case did not show a "present" Sherman Act violation, its UCL analysis assessed the challenged conduct by looking to antitrust's noneconomic rationales.[223] The court was primarily concerned that Apple's practices prevent iOS users from making an "informed choice."[224] Apple's antisteering provisions "create the potential for anticompetitive exploitation of consumers," which the court found was especially problematic due to the need for "open flow of information" in technology markets.[225] While the court chose not to weigh this factor when assessing the Sherman Act claims, this analysis exemplifies how noneconomic rationales can be probative in determining antitrust liability.[226]

Antitrust circles should not expect that economic models will always provide answers to complex questions regarding the proper extent of antitrust liability.[227] When the battle of the economists is evenly matched—and questions of legality hang in equipoise—

MICH. L. REV. 213, 249 (1985) [hereinafter Hovenkamp, *Antitrust After Chicago*] ("[L]egislative histories of the various antitrust laws fail to exhibit anything resembling a dominant concern for economic efficiency."). Most calls for restructuring the rule of reason seek to tweak economist models or revise the consumer-welfare standard. *See* Schrepel, *supra* note 18, at 124–125; Hovenkamp, *Rule of Reason*, *supra* note 40, at 131–32. This Note begins with the proposition that by reaching the balancing stage a court has already fully engaged with the conduct's economic underpinnings and now should explore other considerations.

221. *See* Stucke, *Reconsidering*, *supra* note 30, at 611 ("[A]ntitrust officials who warn about social, moral, and political values polluting antitrust analysis . . . argue for an antitrust analysis divorced from reality, a world occupied by self-interested profit-maximizers . . . In short, they render antitrust irrelevant.").

222. Hodsdon v. Mars, Inc., 891 F.3d 857, 866 (9th Cir. 2018).

223. *See* Epic Games, Inc. v. Apple, Inc., 559 F. Supp. 3d 898, 1055 (N.D. Cal. 2021) (internal citations removed). The court noted that lax antitrust enforcement undermines consumer knowledge and choice. *See id.* ("[T]he less information a consumer has about relative price and quality, the easier it is for market participants to charge supracompetitive prices or provide inferior quality.").

224. *Id.*

225. *Id.* at 1055. The court discusses how limiting the amount of product information available to consumers may be exploitative and may also signify anticompetitiveness). *See id.*

226. *See id.* at 995–97, 1001–03.

227. *See* TIMOTHY WU, THE CURSE OF BIGNESS: ANTITRUST IN THE NEW GILDED AGE 135 (2018) ("Decades of practice have shown that the promised scientific certainty of the Chicago method has not materialized, for economics does not yield answers but arguments.").

noneconomic rationales can be the thumb on the scale.[228] In cases that present clear evidence of anticompetitive effects and procompetitive justifications for the challenged conduct, courts should consider (1) whether finding liability would better uphold the political utility of dispersed control over economic resources; (2) whether the challenged conduct interferes with expectations of "industrial liberty" and free private enterprise; (3) whether liability better disciplines or deters harmful business acts; (4) whether the challenged conduct generates or encourages corporate coercion; and (5) whether liability would better enforce the democratic notions of fair competition.[229] These factors were important policy objectives to the framers of the Sherman Act and should comprise part of the analysis today.[230]

Incorporating noneconomic rationales into rule of reason analysis at the balancing stage will ensure that courts do not neglect Congress' statutory design for antitrust law.[231] While it can be difficult to connect a dispute's specific facts to broader considerations of the Sherman Act's legislative goals, judges routinely consider statutory purpose and legislative history and are particularly competent to interpret policy rationales to decide case outcomes.[232] It is possible that a case would require prioritizing the noneconomic goals of the Sherman Act.[233] In those

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228. *See* ATT'Y GEN. COMM., THE ATTORNEY GENERAL'S NATIONAL COMMITTEE TO STUDY THE ANTITRUST LAWS 316 (1955) (arguing that courts and legislatures should determine the confines of antitrust law, not "economic science").

229. *See* Hughes, *supra* note 175, at 290–92 (noting that "political currents" behind the Sherman Act created a need to make trusts accountable to the "right of every man to work, labor, and produce . . . on equal terms"); *see also* Flynn, *Original Intent*, *supra* note 220, at 281–82.

230. *See* Hughes, *supra* note 175, at 292 (reviewing how Congressional debate at the passage of the Sherman Act reflected social and political concerns). Reinjecting such policy prerogatives into the rule of reason is long overdue, as the rule of reason's "gloss" on antitrust's policy goals has been an "effective tool for ignoring the spirit" of the Sherman Act. *Id.*

231. *See* Lande, *supra* note 218, at 86–88. In an era of strong textualism, however, it is unclear whether a more purposive approach to antitrust statutory interpretation would gain strong traction among lower courts. *See* Robert H. Lande, *A Traditional and Textualist Analysis of the Goals of Antitrust: Efficiency, Preventing Theft from Consumers, and Consumer Choice*, 81 FORDHAM L. REV. 2349, 2361–63 (2013) (explaining that a textualist analysis of antitrust statutes would not consider rationales outside of the language of the statute).

232. *See supra* notes 189–190 and accompanying text.

233. For example, when the defendant contracts heavily with international firms subject to other countries' antitrust laws, domestic business conduct would not threaten repeated or systemic violations of antitrust laws. It is also possible that the remedies available to a plaintiff would otherwise not affect noneconomic considerations.

circumstances, however, a court should explain why noneconomic factors are not relevant and why economic rationales are more pertinent to its ruling.[234]

3. *Question Three: Would Outlawing Conduct that Otherwise Significantly Threatens or Harms Competition Better Uphold the Overall Competitive Process, Despite Causing Harm to Individual Competitors?*

Antitrust jurisprudence often emphasizes that its goal is to protect the competitive process, not individual competitors.[235] Yet the less restrictive alternatives prong—acting as an outcome-determinative stage in the rule of reason—has done just that: The current formulation of this stage serves to protect the defendant's bottom line.[236] By requiring less restrictive alternatives that do not impose increased costs on Apple, *Epic Games* demonstrates that the rule of reason improperly prioritizes competitor profits over the competitive process.[237]

After engaging in the less restrictive alternatives inquiry at the market-participant level, the balancing stage should explicitly counterbalance considerations of individual firm profits by assessing how the conduct affects the competitive process at the market level.[238] Courts should ask if a finding of liability, despite potential harm to the present defendant, would better protect broader structural fairness in the competitive process.[239] Specifically, courts should ask (1) how their ruling affects

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234. *See* WU, *supra* note 227, at 135 ("While the tools of economics will always be essential to antitrust work, it is a disservice . . . to retain such a laserlike focus on price effects as the measure of all that antitrust was meant to do."). Big tech—evidence of the Chicago School's exclusive consumer-welfare focus—is "ripe for reinvigoration" of stronger antitrust enforcement. *See id.* at 126.

235. *See supra* notes 25–26 and accompanying text.

236. *See supra* notes 152–153 and accompanying text.

237. *See supra* Part II.C.3. The court's analysis suggests that a proposed alternative *could* better uphold the competitive process, but still remain an insufficient alternative if it imposes costs on the firm's operations. *See id.*

238. Another solution would be to make a less demanding less restrictive alternatives stage. This stance, however, has recently been rejected by the Supreme Court. *See* Nat'l Collegiate Athletic Ass'n v. Alston, 594 U.S. 69, 101–06 (2021) (upholding the lower court's requirement that plaintiffs must show "significantly" less restrictive means to prevail).

239. *See supra* notes 164–167 and accompanying text. The UCL's broad inquiry into whether challenged conduct "otherwise significantly threatens or harms competition" does not look toward additional costs and it imposes liability whenever necessary to uphold the competitive process. *See* Cel-Tech Commc'ns, Inc. v. L.A. Cellular Tel. Co., 973 P.2d 527, 543–44 (Cal. 1999)). This policy choice should be imported into rule of reason balancing.

structural reliance interests of all similarly situated parties in the marketplace; (2) whether nonliability would reinforce barriers to market entry; (3) how disruptive finding the present party liable would be to the defendant's other commercial relationships; and (4) whether imposing liability would create unintended consequences that make the market impossible or unattractive to sustain in the long-term future.[240]

Full antitrust liability in *Epic Games*—eliminating Apple's ability to dictate payment processing and capture in-app commissions—would have surely diminished Apple's profits.[241] The court acknowledged that the DPLA prevented developers from creating rival distribution stores and decreased the quality of available app distribution features, both of which reduce interbrand competition and harm the competitive process.[242] If injunctive relief prevented Apple from requiring the use of IAP, Epic Games and other developers could have created rival payment systems or stores to compete with Apple for digital distribution on the merits.[243] While a court still must determine whether Apple's justifications are more compelling on balance, the court in *Epic Games* appeared protective over Apple's costs. It did not discuss the potential growth in market competition that might result if the court were to find Apple liable.[244]

Defendants' costs should be immaterial if liability would create a stronger competitive landscape, especially in the context of digital-platform markets.[245] But if courts feel they must consider individual market participants in less restrictive alternatives

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240. *See* Khan, *supra* note 201, at 745–46. These questions—with an eye toward remedies—prod courts to assess competition between two market participants within the broader industry's structure. While it may be difficult to separate individual enforcement and deterrence measures from the firm's broader "structural dominance" over the industry, courts can ask litigants to make their best arguments for the case's larger impact. *See id.* at 756.

241. *See* Epic Games, Inc. v. Apple, Inc., 559 F. Supp. 3d 898, 996 (N.D. Cal. 2021).

242. *See id.* New stores or payment options would increase output and bring more competitors into the market, both of which indicate a more rigorous competitive process. *See* Ohio v. American Express Co., 585 U.S. 529, 549 (2018) (articulating that expanded output from new competitors is procompetitive).

243. *See American Express*, 585 U.S. at 552 (noting the relationship between procompetitive behavior and "robust" interbrand competition).

244. *See supra* notes 159–163 and accompanying text.

245. *See supra* notes 74–75 and accompanying text. If stricter antitrust enforcement can mitigate dangerous winner-take-all effects or lessen long-term coercive contractual advantages, then the market will have a stronger competitive landscape as a result, especially as norms of zero-sum Pareto efficiency suggest that one competitor's loss leads to another competitor's gain. *See* Hovenkamp, *Antitrust After Chicago*, *supra* note 220, at 240.

analyses, they should also look at the market structurally in the balancing stage to assess whether there is stronger competition as a direct or indirect result of those losses.[246] This will allow a court to offset the shortcomings of the less restrictive alternatives prong and squarely address the competitive process as the ultimate beneficiary of antitrust litigation.[247]

CONCLUSION

Antitrust law has always entrusted courts with articulating the contours of the Sherman Act.[248] But modern rule of reason analysis and its constrained burden-shifting framework distract proper evaluation of antitrust claims in emerging digital-platform markets. *Epic Games* represents the pitfalls of current judicial analysis, but it also signals how the rule of reason could evolve as more marketplaces move online. Fourth-stage balancing indicates antitrust's further slide into judicial standards; courts need intentional space to look beyond antitrust's economic horse blinders fastened in place by the consumer-welfare perspective. In balancing efforts, courts should be more attentive to emerging schemes, the Sherman Act's noneconomic principles, and resulting structural changes to the competitive process. Such recalibration can offset the shortcomings of the rule of reason's narrow focus on efficiency and innovation. Only then can the doctrine recenter the neglected considerations that are vital to antitrust law's salience.

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246. *See* DONALD F. TURNER & CARL KAYSEN, ANTITRUST POLICY: AN ECONOMIC AND LEGAL ANALYSIS, 59–61 (1959) (arguing that the amount of competition depends on the industry's degree of concentration, with highly concentrated industries creating structural incentives to act anticompetitively).

247. *See* Flynn, *Concept of Process*, *supra* note 219, at 896. While economics considerations are "often identified with narrow and self-defining goals for antitrust policy advocated by neoclassical price theory," a court's attentiveness to the competitive process instills a "broader vision . . . of social, political, and economic goals." *Id.* Thus, attempts at balancing that benefit the competitive process should also harmonize with antitrust's legislative goals.

248. *See* AREEDA ET AL., *supra* note 12, at 35.