THE LAW AND ECONOMICS OF POST-EMPLOYMENT COVENANTS: A UNIFIED FRAMEWORK

Mark A. Glick *

Darren Bush **

Jonathan Q. Hafen ***

INTRODUCTION

Covenants not to compete contained within post-employment contracts have been finding renewed vigor in many sectors of the economy. Especially common in the high-tech sectors of the economy and with respect to upper management in all sectors, these contracts are used by employers to secure what has become the critical cornerstone of the U.S. economy—skills based upon knowledge, extensive training, and experience. Employers regard post-employment restraints as an important if not essential method for protecting their investment in their employees, including not only trade secrets and customer contacts, but also perhaps employee training costs. Many employees dislike post-employment covenants for precisely that reason: After many years of expensive education, employees seeking a return on their investment do not wish to be held captive by employers seeking to restrict their career opportunities.

While covenants not to compete have increasingly become a key part of employment relationships (much to the chagrin of the employees), state case law has lagged behind, failing to forge the tools necessary to deal adequately with the many difficult issues raised by post-employment restraints in a high-tech, knowledge based economy. Consequently, state courts deal

* Professor of economics, University of Utah, and of Counsel, Parsons Behle & Latimer. J.D, 1990, Columbia, Ph.D (Economics), 1985, New School for Social Research. He is also a member of the New York and Utah Bars.

** Assistant Professor of Law, University of Houston Law Center. J.D., 1998, Ph.D. (Economics), 1995, University of Utah. He is also a former Honors Program Attorney at the United States Department of Justice's Antitrust Division. The author would like to thank Salvatore Massa, John Flynn, and Boyd Dyer for their comments.

*** Partner, Parr Waddoups Brown Gee and Loveless. J.D., 1991, Brigham Young University (Order of the Coif and *summa cum laude*). He is a member of the Illinois and Utah Bars.

with covenants not to compete much like they deal with tort cases—in a highly unpredictable and ad hoc fashion.[1]

There are many reasons, of course, for this unpredictability.[2] Courts have engaged in the analysis of covenants not to compete in a highly fact-based manner. Courts may interpret key facts differently because both the facts and the individual ideologies of the judges are not uniform across cases. It thus becomes difficult if not impossible for practitioners to make predictions as to whether any covenant they draft will be enforceable.[3] Second, public policy has not come out too strongly for or against the use of post-employment covenants not to compete. This may be because of tensions between the notion of freedom of contract that runs throughout contract law and paternalistic notions that are equally pervasive.[4] Additionally, freedom of contract is at odds with antitrust law where the covenant may restrain trade.[5]

The discipline of Law & Economics can contribute to a more sound analysis of post-employment restraints by state courts. By providing a uniform theory through which post-employment covenants might be analyzed,

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1 Michael Sean Quinn & Andrea Levin, *Post Employment Agreements Not to Compete: A Texas Odyssey*, 33 TEX. J. BUS. L. 7, 12 (1996). In fact, covenants not to compete are frequently challenged in the context of tort litigation such as trade secret misappropriation. *Id.* at 11.

2 There are also many proposed solutions. *See, e.g.*, Christine O'Malley, *Covenants Not to Compete in the Massachusetts Hi-Tech Industry: Assessing the Need for a Legislative Solution*, 79 B.U. L. REV. 1215 (1999); Christi L. Johnson, Note, Travel Masters v. Star Tours*: A Recent Texas Supreme Court Decision Highlights the Tension Between the Court and the Texas Legislature Regarding Covenants Not to Compete*, 44 BAYLOR L. REV. 937 (1992); Gary P. Kohn, *A Fresh Look: Lowering the Mortality Rate of Covenants Not to Compete Ancillary to Employment Contracts and to Sale of Business Contracts in Georgia*, 31 EMORY L.J. 635 (1982); Brett D. Pynnonen, *Ohio and Michigan Law on Postemployment Covenants Not to Compete*, 55 OHIO ST. L.J. 215 (1994) (advocating that Michigan adopt Ohio's definition of "reasonableness.").

3 *Id.*

4 For a discussion of the tensions between the notions of freedom of contract and paternalism, see Darren Bush, *Caught Between Scylla and Charybdis: Law & Economics as a Useful Tool for Feminist Legal Theorists*, 7 AM. U. J. GEN. POL'Y & L. 395 (1998).

5 Quinn and Levin list several factors to explain the tension. *See* Quinn & Levin, *supra* note 1, at 11-12. Specifically, factors they list in favor of enforcing covenants not to compete include:

> 1. encouragement of commercial/industrial investments in the development of technology, the development of sophisticated business methods, and the distribution of training; 2. encouragement of efficient business operation by fostering open internal communications, encouragement of loyalty as a social virtue . . . 4. protection of commercial . . . investment in customer relationships; and 5. freedom of contract.

Id. Quinn and Levin also list five policies which disfavor enforcement:

> 1. traditional Anglo-American common law skepticism about restraints of trade; 2. American societal, psuedo-constitutional preference favoring personal freedom; 3. encouragement of labor's economic mobility; 4. realism about freedom of contract where there is inequality of bargaining power and at least quasi-adhesionary contracts; and 5. American cultural stated preference for the small over the large, the apparently weak over the obstensibly strong, and the individual over the organization.

Id. at 12.

Law & Economics analysis holds promise in fostering greater predictability in this realm.

This article sets forth a unified framework for analyzing post-employment restraints that can assist plaintiffs, defendants, and courts in evaluating issues raised by such covenants. The article commences with a brief introduction describing the history of post-employment covenants under the tracks of early common law and nascent U.S. antitrust law. The article next discusses the modern treatment of post-employment covenants by state courts. The article then outlines the ideological tenets that provide the basis for an approach to analyzing post-employment covenants—namely, those of the Law & Economics School and its analysis of contract law. The article then establishes the factors that the authors would use to analyze covenants not to compete. The article concludes that the authors' approach provides greater predictability to disputes arising from post-employment covenants and that their approach enhances the efficiency of such contracts by reducing the risk that the careful drafting of the contract was all for naught.[6]

I. TWO SOURCES OF LEGAL PRECEDENT

Post-employment restraints traverse two distinct areas of law, contracts and restraints of trade. State courts have used traditional principles of contract law to analyze covenants not to compete, occasionally incorporating elements of the common law from restraints of trade. In contrast, federal courts have analyzed post-employment restraints largely under the Sherman Act.[7] The Sherman Act originally codified the early common law of restraints of trade in the late nineteenth century, but jurisprudence under the Sherman Act has developed significantly over the last century. The Supreme Court recognized these common roots in *National Society of Professional Engineers v. United States*,[8] where the Court explained that both the Sherman Act and state law regarding common law restraints of trade can be traced to a common origin.[9]

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6 Many have cautioned that careful drafting of non-compete clauses is necessary to ensure the enforceability of the contract. *See, e.g,* David L. Gregory, *Courts in New York Will Enforce Non-Compete Clauses in Contracts Only if They are Carefully Contoured*, 72 N.Y. ST. BAR J., Oct. 2000, at 27.

7 15 U.S.C. §§ 1-7 (1997). Section 1 provides in part that "[e]very contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce. . . is declared to be illegal."

8 435 U.S. 679 (1978); *see also* Standard Oil Co. of N.J. v. United States, 221 U.S. 1 (1911) (relying on common law precedents to give meaning to the Sherman Act).

9 "The Rule of Reason, with its origins in common-law precedents long antedating the Sherman Act, has served" the purpose of giving "shape to the [Sherman Act's] broad mandate." *Nat'l Soc'y of Prof'l Eng'rs*, 435 U.S. at 688 (discussing Mitchel v. Reynolds, 1 P. Wms. 181, 24 Eng. Rep. 347 (Q.B.

A. *The Common Law Origins of Post-Employment Restraints*

The early common law essentially separated agreements in restraint of trade into three distinct categories: general restraints of trade, partial restraints of trade, and restraints on future employment.[10] General restraints of trade consisted of those agreements that always impeded trade in some way and had no clear benefit to competition.[11] These agreements were void per se.[12] Partial restraints of trade were those agreements ancillary to the sale or transfer of a business interest.[13] Although these agreements certainly constituted a restraint of trade, the English courts generally upheld such agreements, so long as they were reasonably tailored to the scope of the connected transaction.[14] Finally, restraints on future employment were the same as modern day covenants not to compete, and were held invalid, irrespective of the scope of the restriction, because of their negative impact on economic freedom.[15]

1. Early Common Law Treatment of Post-Employment Restraints

At common law, restraints on future employment were deemed invalid per se was because they circumvented the customary rules of apprenticeship.[16] During the fifteenth and sixteenth centuries in England, the apprenticeship system was a major component of the overall economy.[17] In fact, during this period, craft guilds were the dominant vehicles of economic activity in England.[18] These guilds were comprised of three basic groups: the masters, the journeymen, and the apprentices.[19] The goal of the apprenticeship system was to provide the master craftsman with a small labor force, and provide young men with a means of technical training to introduce them to the skills of the given trade.[20] The relationship between ap-

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1711)).

10 *Id.*

11 *Id.* This proposition is inferred from the cited material based on the explanation of partial restraints discussed later.

12 *Id.*

13 *Id.*

14 *Id.* In general, the theory was that if the partial restraints were reasonably tailored, then their impact on economic freedom and competition would be minimal.

15 *Id.*

16 *Id.* at 632-634.

17 *Id.* at 632.

18 *Id.*

19 *Id.* at 633.

20 *Id.*

prentice and master was a contractual one: the master agreed to provide essential training to the apprentice in exchange for low wage labor over a given period of time, usually seven years.[21] At the end of the contractual period, the apprentice would be free, as a journeyman, to practice his trade, eventually becoming a master.[22] Essentially, the goal was to produce highly skilled and competent masters, thus increasing productivity and overall economic efficiency.

Sometimes, masters, in an attempt to decrease the amount of competition present in a given trade and geographical area, would force their apprentices to enter into agreements that made it difficult or impossible for them to become masters.[23] Such agreements, like modern covenants not to compete, restricted the apprentice's ability to set up shop in direct competition with the master, and were viewed as general restraints that acted to directly decrease competition and hinder economic freedom.[24] During this time period, it appears that the desire to promote economic freedom and the importance of allowing highly trained apprentices to participate competitively in their trades were crucial factors in the rejection of past-employment restraints by the early English courts.

Dyer's Case[25] provides a good example of the typical view of restrictive covenants at the time. *Dyer's Case* is the first known case dealing with restrictions on the individual practice of a craft.[26] In *Dyer*, the plaintiff brought a writ of debt against the defendant, a dyer by trade.[27] The defendant Dyer asserted that, according to his "indenture," or apprenticeship contract, the debt was to be forgiven so long as he did not practice his trade in the plaintiff's town for six months after his training.[28] He further claimed that he had satisfied this requirement.[29] Although the case was allowed to proceed, and no further proceedings are reported, the Lord of the English court hinted that the defendant might have demurred because the restriction was illegal at common law.[30]

Written about 150 years after *Dyer*, four cases demonstrate that the early common law view against restraints on future employment per-

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21 *Id.*

22 *Id.*

23 *Id.* at 634.

24 *Id.* Generally, the attempts by the courts and lawmakers to prevent the imposition of such restrictions led to the inferences made.

25 Y.B. Mich. 2 Hen. 5, fol. 5, pl. 26 (C.P. 1414).

26 Harlan M. Blake, *Employee Agreements Not to Compete*, 73 HARV. L. REV. 625, 636 (1960).

27 *Id.*

28 *Id.*

29 *Id.*

30 *Id.* "By God, if the plaintiff were here he should go to prison until he paid a fine to the King." Dyer's Case, Y.B. Mich. 2 Hen. 5, fol. 5, pl. 26 (C.P. 1414) (cited in KURT H. DECKER, COVENANTS NOT TO COMPETE 22 (1993)).

sisted.[31] In an anonymous case, decided in 1578, a master required his apprentice to agree not to employ the craft for four years after his training was complete.[32] The court held that the obligation was void.[33] Twenty-four years later, in *Colgate v. Bacheler*, the defendant's son obligated himself to pay the plaintiff twenty pounds if he engaged in the trade of a haberdasher within the county of Kent, primarily in the cities of Canterbury or Rochester, prior to a certain date.[34] The court specifically noted the restraint was not a broad one, but ruled that it was unlawful "to restrain the practice of a trade 'at any time, or 'at any place'."[35] Although the reports of such cases are sketchy, and the courts do not provide specific explanation as to why the decisions were made, they demonstrate the early English view that all restraints against future employment were invalid.

In 1587, a plaintiff blacksmith who brought an action against another blacksmith for breach of a covenant not to compete was thrown in jail for doing so in the case of the *Blacksmiths of South-Mims*.[36] The restriction had no time limitation and a broad geographic boundary that extended beyond the town.[37]

In 1614, in the *Ipswich Tailor's* case[38] the tailor's guild sued another tailor for failing to first serve in an apprenticeship capacity in the town and for not being sanctioned by the guild. The court ruled that the restriction was invalid because "at common law, no man could be prohibited from working in any lawful trade."[39]

The historical context of these cases indicate that they arise from economic fears arising from deep labor shortages and systems of apprenticeship that were designed to ensure that apprentices did not rise to compete against their masters. In the mid 1300s, the "Black Death" caused labor to be exceptionally scarce.[40] Thus, each and every employee had great value. Unemployment was unlawful[41] for anyone under 60 years of age, and any

31 Blake, *supra* note 26, at 634-635.

32 *Id.* at 634.

33 *Id.* at 635.

34 *Id.*

35 *Id.*

36 2 Leo. 210, 74 Eng. Rep. 485 (C.P. 1587).

37 DECKER, *supra* note 30, at 24.

38 77 Eng. Rep. 1218 (K.B. 1614).

39 *Id.* (quoted in DECKER, *supra* note 30, at 24).

40 DECKER, *supra* note 30, at 22.

41 Unemployment at the time could have been perceived as an exercise in market power by someone who was seeking to increase wages. Note that the Act of 1548 proscribed criminal penalties for any laborer who conspired or agreed to raise wages or reduce hours, 2 & 3 Edw. 6, ch. 15, *confirmed by* 22 & 23 Car. 2, ch. 19 (1670).

restriction on the mobility of labor could have been interpreted as aiding and abetting criminal activity.[42]

Craft guilds also contributed to the development of early common law regarding restrictive covenants. During the fourteenth through sixteenth centuries, labor shortages coupled with the rise of these guilds caused the courts to seek to ensure the mobility of masters and journeymen in order to provide the public with access to those with skills and expertise.[43] The Statute of Artificers and the Act of 1548 implementing criminal penalties for persons conspiring to raise wages or reduce hours were passed during this period.[44]

Following these cases, there was a long and difficult transition from the apprenticeship system to an entrepreneurial system of capitalism.[45] During this transition, while the desire for economic freedom and competition remained, the concepts of economic liberalism and the primacy of contractual obligation were developing deep roots in legal and economic thought.[46] Guilds declined in importance as increased mechanization required unskilled workers.[47] A growing merchant class also became concerned about restrictions on the nature of their economic activity.[48] It is at the beginning of this transition, in 1717, that the pivotal case regarding covenants not to compete, *Mitchel v. Reynolds*, was decided.[49] In *Mitchel*, the defendant sold a bake-house to the plaintiff in the city of St. Andrews Holborn.[50] As a condition of the sale, the defendant agreed not to participate in the baking business for five years.[51] If the defendant breached the agreement, he was to pay the plaintiff a bond of fifty pounds.[52] After the defendant breached the condition, the plaintiff brought suit for the fifty pounds. The defendant argued that, because he was a baker by trade, the agreement constituted a restraint on future employment and was therefore void in law.[53] Lord Macclesfield, writing for the court, ruled for the plaintiff.[54]

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42 DECKER, *supra* note 30, at 22-23. Laws regulating apprenticeship were passed in light of the labor shortage. These laws later became the substance of the Statute of Artificers of 1563, 5 Eliz. 1, ch. 4, and the Act of 1548, 2 & 3 Edw. 6, ch. 15, *confirmed by* 22 & 23 Car. 2, ch. 19 (1670).

43 DECKER, *supra* note 30, at 23.

44 *See supra* note 42.

45 Blake, *supra* note 26, at 637.

46 *Id.*

47 DECKER, *supra* note 30, at 26.

48 *Id.*

49 1 P. Wms. 181, 24 Eng. Rep. 347 (Q.B. 1711).

50 *Id.*

51 *Id.*

52 *Id.*

53 *Id.*

54 *Id.*

Two lines of thinking are evident in Macclesfield's opinion. Initially, he appears to have abandoned the early common law view that *all* restraints on future employments were automatically void:

> Some observations which may be useful in understanding these cases are: First, that to obtain the sole exercise of any known trade throughout England is a complete monopoly, and against the policy of the law. Secondly, that when restrained to particular places or persons, the same is not a monopoly. Thirdly, that since these restraints may be by custom, and custom must have a good foundation, the thing is not absolutely and in itself unlawful. . . . [55] Sixthly, that where the law allows a restraint of trade, it is not unlawful to enforce it with penalty. Seventhly, that no man can contract not to use his trade at all. Eighthly, that a particular restraint is not good without just reason and consideration.[56]

Moreover, Macclesfield recognized the importance of the freedom of contract theory. The impact of freedom of contract theory on Macclesfield's decision is evidenced by his statements that "a man may, upon a valuable consideration, by his own consent, and for his own profit, give over his trade, and part with it to another in a particular place," and that "the true distinction of this case is, not between promises and bonds, but between contracts with and without consideration."[57]

Beyond recognizing the importance of contract theory, the part of the *Mitchel* decision which had the greatest impact on the future of antitrust and restraint of trade law, was the introduction of what is now called the "rule of reason" test.[58] In *Mitchel*, Macclesfield stated that "in all restraints of trade, where nothing more appears, the law presumes them bad; but if the circumstances are set forth, that presumption is excluded, and the court is to judge of those circumstances, and determine accordingly; and if upon them it appears to be a just and honest contract it ought to be maintained."[59]

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55 The fourth and fifth points Lord Macclesfield made in this quotation are excluded here because they are irrelevant to the current discussion.

56 *Id.*

57 *Id.*

58 Arguably, the "rule of reason" analysis existed prior to *Mitchel*, especially in the context of restraints of trade, which were ancillary to the sale of business interests and property. However, it is generally accepted that the *Mitchel* case clarified and developed the principles of the rule into a workable and precedential test. It is from *Mitchel* that the American courts have adopted and developed their own "rule of reason" analysis under the Sherman Act. *See, e.g.*, Nat'l Soc'y of Prof'l Eng'rs v. United States, 435 U.S. 679 (1978). Thus, for purposes of this article we will work under the assumption that the "rule of reason" test was introduced, for the first time, in *Mitchel*.

59 Mitchel v. Reynolds, 1 P. Wms. 181, 24 Eng. Rep. 347 (Q.B. 1711). Lord Macclesfield made a distinction between general restraints of trade (those that extended throughout England) and particular restraints (those with a more limited geographic scope). With respect to the former, Macclesfield believed that these restraints "would be of no benefit to either party and only oppressive." 1 P. Wms. at 182, 24 Eng. Rep. at 348. As to particular restraints, Lord Macclesfield believed that such restraints could be valid, if supported by adequate consideration. DECKER, *supra* note 30, at 27.

After *Mitchel*, while the traditional rule remained that all restraints of trade were *prima facie* invalid, the court allowed the parties to prove the validity of covenants not to compete based on the circumstances involved. Under this test, in determining whether or not to uphold a contract which, on its face, restrained trade, the court was asked to determine whether or not there was some essential economic or business purpose behind the agreement, and whether or not the contract was supported by adequate consideration. If the contract was based on adequate consideration, and had economic and business purposes, then the court was to look at the surrounding circumstances and determine if, given the circumstances as they were at the time the agreement was made, the terms of the agreement were reasonable.

One important note about the *Mitchel* decision, however, is that Macclesfield did not base his decision on a strong belief and desire to promote freedom of contract concepts. Rather, he "clearly felt that inequality of bargaining power might be a determinative consideration."[60] Thus, his recognition of contract principles, especially the requirement of valid consideration, likely had much to do with his belief that such principles assured that the contract was not coerced, or was at least fair, rather than a desire to promote contractual principles themselves or impose an undue limitation upon the freedom of the defendant.

With *Mitchel*, the essential legal theory of employment covenants was largely complete.[61] As a result of long transition from a feudal to a capitalist economy, businesses in England faced an increase in competition, and employers began searching for new and improved ways of protecting their businesses. By the late eighteenth and early nineteenth centuries, as England fully abandoned the apprenticeship system, freedom of contract became an essential part of the ideology of the English market system. The stable enforcement of contracts replaced the stability lost from the apprenticeship system.[62] As the freedom to contract grew, the courts faced the challenge of having to reconcile previous opinions, such as *Mitchel*, rooted in the old feudal economic system, with the new economic realities.

The expansion of post-employment restrictive covenants clearly demonstrates the shift from the apprenticeship system to the contractual system. As entrepreneurial capitalism prospered, and competition increased, contractual provisions restricting future employment became more and more commonplace.[63] Without the certainty of the apprenticeship system to regulate competition, maintain an accessible, skilled, and affordable work force, and ensure the availability of affordable and adequate training, contracts

60 Blake, *supra* note 26, at 637.

61 *Cf. id.* at 638.

62 *Id.*

63 *Id.*

became the basic means of regulating the employment relationship.[64] Masters-turned-employers "wanted to protect themselves from excessive future competition by employees, or at least from the loss of customers or trade secrets to the new competition."[65] As for the apprentices-turned-employees, with the loss of the apprenticeship system came the loss of a guaranteed job market and training possibilities.[66] To assure themselves work and training in the new economic system, many employees were willing, or had no better alternative, "than to restrict their future freedom of action in order to obtain present employment and the training and experience which came with it."[67]

Even with a change in economic systems, and the need for legal adaptation in the area of restraints of trade, however, the courts did not completely abandon the basic premises of Lord Macclesfield's "rule of reason" analysis.[68] What did change, however, was the focus of the "reasonableness" element of the analysis. As previously stated, Macclesfield relied partly on the existence of valid consideration as a threshold of inquiry to the "reasonableness" of the restraint. Without a showing of adequate consideration, the court would, theoretically, refuse to enforce the restraint. However, as the society became more capitalist, and legal scholars turned more towards contract principles, the courts began adopting less stringent, more flexible requirements. What became important was not the actual consideration for the contract itself, but whether the contract, in its entirety, was fair and reasonable.

Appropriately enough, the adaptation of the *Mitchel* "rule of reason" test to changing economic conditions began in cases regarding restraints on future employment. The first English case to clarify and reformulate the "rule of reason" test, in 1831, was *Horner v. Graves*.[69] *Horner* involved a restraint on future employment that prohibited a dentist's assistant from practicing dentistry within 100 miles of his employer's town, so long as the employer remained in practice.[70] In declining to enforce the agreement, the court found that the element of reasonableness was not limited to the consideration stated in the contract, but concerned all facts relevant to "whether the restraint is such only as to afford a fair protection to the interests of the party in favour of whom it is given, and not so large as to interfere with the

64 *Cf. id.*

65 *Id.*

66 *See id.*

67 *Id.*

68 *Id.* at 639-640.

69 7 Bing. 735, 131 Eng. Rep. 284 (C.P. 1831).

70 *Id.* The term "dentist's assistant" in this case refers to a dental apprenticeship and not a dental hygienist or other such professional commonly referred to as dental assistants today.

interests of the public."[71] The court decided that the restriction was unreasonably broad because the personal nature of dental service made it impossible for such a wide area to be serviced by the previous employer himself.[72] Essentially, the court reformulated the "reasonableness" test, and required that the courts balance the interests of the parties with the interests of the public.[73]

Eight years later, the court applied the rule of reason test in *Ward v. Byrne*[74] and voided a restrictive covenant limited only by a duration of two years. The defendant in this case had agreed not to solicit or sell to any of plaintiff's customers for two years, and also agreed not to work for a competitor for nine months.[75] The court, taking its cue from *Mitchel*, voided both restraints as general in nature because they were not geographically limited.

Following *Horner*, the English courts further adapted the "rule of reason" test to fit the modern entrepreneurial, capitalist economic system and the promotion of freedom of contract principles in *Tallis v. Tallis*.[76] In *Tallis*, the Court of Queen's Bench modified the traditional rule, announced by *Mitchel*, that all restraints of trade are *prima facie* invalid, and held instead that the burden was on the covenantor to show that the covenant was unreasonable and therefore invalid.[77] Unless such a showing was made, the reasonableness of the agreement would be presumed and the agreement upheld as a contract freely entered into by the parties. After *Tallis*, there was no question that the predominant focus of the English courts, in analyzing contracts in restraint of trade, was freedom of contract. This is clearly evidenced by the following pronouncement made by an English court shortly after *Tallis*:

> It must not be forgotten that you are not to extend arbitrarily those rules which say that a given contract is void as being against public policy, because if there is one thing which more than another public policy requires it is that men of full age and competent understanding shall have the utmost liberty of contracting, and that their contracts when entered into freely and voluntarily shall be held sacred and shall be enforced by Courts of justice. Therefore, you have this paramount public policy to consider—that you are not lightly to interfere with this freedom of contract.[78]

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71 *See id.*

72 *Id.*

73 *Id.*

74 5 M. & W. 548, 151 Eng. Rep. 232 (Ex. 1839).

75 DECKER, *supra* note 30, at 28.

76 1 El. & B. 391, 118 Eng. Rep. 482 (Q.B. 1853) (cited in Blake, *supra* note 26, at 640).

77 *Id.*

78 Blake, *supra* note 26, at 640-41 (quoting Printing & Numerical Registering Co. v. Sampson, L.R. 19 Eq. 462 (Eng. Ch. 1875)).

Not surprisingly, it was not long until the English courts adopted contract principles in all restraint of trade cases, including those regarding "general restraints." In 1897, in *Nordenfelt v. Maxim Nordenfelt Guns & Ammunition Company*, for example, the English court upheld the sale of a vast munitions business and a world-wide covenant not to compete.[79] In deciding the case, the House of Lords resolved any lingering doubts about the validity of "general" restraints by holding "that a restraint [which was] no wider than reasonably necessary to protect the interests of the covenantee and not against the public interest should be upheld."[80] Lord MacNaughten, concurring, set out what is the foundation of the modern test:

> [R]estraints of trade and interference with individual of action may be justified by the special circumstances of a particular case. It is sufficient justification, and indeed, it is the only justification, if the restriction is reasonable—reasonable, that is, in reference to the interests of the parties concerned and reasonable in reference to the interests of the public, so framed and so guarded as to afford adequate protection to the party in whose favour it is imposed, while at the same time it is in no way injurious to the public.[81]

Early American common law on restraints of trade paralleled the English treatment. Early cases applied the general/particular rule first adopted in *Mitchel*.[82] This rule as later superceded by the rule of reason.[83] However, the early American rule also examined the interests of the employee, not just the terms of the contract.[84]

2. The Sherman Act

While the common law of restraints of trade was imported largely intact from England to the United States, the dramatic transformation of the American economy during the Industrial Revolution led to dissatisfaction with common law remedies. Massive mergers and growth of industry led to tremendous rivalry between large efficient firms with homogeneous products previously protected by local markets. The rise of large firms and more advanced communication and transportation resulted in the breakdown of local boundaries. The period after the Civil War was characterized by se-

79 [1894] A.C. 535, *aff'g* [1893] 1 Ch. 630 (Ch. App. 1892).

80 Discussed in Blake, *supra* note 26, at 642.

81 *Nordenfelt*, [1894] A.C. at 565.

82 "General" restraints could still be limited in geography, however, if the limitation was the entire state. *See* DECKER, *supra* note 30, at 30.

83 *See, e.g.*, Keeler v. Taylor, 53 Pa. 467, 470 (1867); Or. Steam Navigation Co. v. Winsor, 87 U.S. (20 Wall.) 64 (1874).

84 Blake, *supra* note 26, at 643-44.

vere price competition and deflation. The natural reaction of firms engaged in what was perceived as destructive competition was to develop cartels in the form of trusts and stock pools to curtail price competition.

The public perception of the "trust problem" led to irresistible pressure for congressional action. The primary flaw of the common law of restraints in controlling the trusts was that contractual privity was required for standing (possessed only by the cartel members themselves) when the primary anticompetitive effect was borne by third parties (consumers and small businesses).[85] The Sherman Act[86] essentially codified the common law of restraints by stating "[e]very contract, combination in the form of trust or otherwise, or conspiracy, in *restraint of trade* ..." is illegal,[87] while at the same time extended standing to the government and affected private parties.[88]

When Congress enacted the Sherman Act on July 2, 1890, the result from the competing economic and political forces was a compromise between those who feared big business, primarily because of its impact on political and economic freedom, and those who supported big business, which promoted efficiency and higher levels of production resulting in lower costs.[89] Rather than create a law that required ultimately "free competition," leaving no room for any trust activity, as the original proponents of the Act suggested, Congress adopted the more ambiguous common law concepts that prohibited restraints of trade and monopolies.[90] This less stringent law provided some protection for traditional business without

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85 *See* Associated Gen. Contractors of Cal., Inc. v. Cal. State Council of Carpenters, 459 U.S. 519, 521 (1983); *see also* William H. Page, *The Scope of Liability For Antitrust Violations*, 37 STAN. L. REV. 1445, 1509 (1985) ("[The *Associated General Contractors*] Court said, courts should interpret the scope of the private remedy in light of the common law limitations on damages in tort and contract cases: 'proximate cause, directness of injury, certainty of damages, and *privity of contract*.'") (emphasis added).

86 15 U.S.C. §§ 1-7. For a discussion of restraints as analyzed under the Sherman Act and its common law antecedents, see HANS B. THORELLI, THE FEDERAL ANTITRUST POLICY: ORIGINATION OF AN AMERICAN TRADITION 41-48, 436-499 (1955). For a discussion of restraints of trade at common law in England, see *id.* at 17-20.

87 15 U.S.C. § 1 (emphasis added).

88 *Id.* § 4 ("[I]t shall be the duty of the several United States attorneys . . . to institute proceedings in equity to prevent and restrain such violations."). Federal courts typically have jurisdiction in federal antitrust suits. *See id.* § 15(a) ("Except as provided in subsection (b), any person who shall be injured in his business or property . . . may sue therefore in any district court of the United States in which the defendant resides . . . or has an agent . . . .").

89 *See generally* THORELLI, *supra* note 86, at 319-26; *cf.* GERALD DUMENIL & DOMINIQUE LEVY, THE ECONOMICS OF THE PROFIT RATE: COMPETITION, CRISES AND HISTORICAL TENDENCIES IN CAPITALISM 322-323 (1993).

90 THORELLI, *supra* note 86, at 225 (stating that Congress wanted "not only to provide redress for private wrongs but also to build into the act the feature of self-enforcement that had been typical in cases of restraint of trade at common law.").

completely sacrificing the advantages of the corporate revolution.[91] Thus, though the original goal and purpose of the Sherman Act was to protect traditional firms, in reality, the final version would become more of a compromise between the two competing views on big business.[92]

This compromise is evidenced by the language of Section 1 itself: "Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is hereby declared illegal."[93] Rather than defining "restraint of trade," Congress left the term purposefully ambiguous in order to avoid limiting the protections afforded to traditional firms by the Act. The courts quickly developed a body of jurisprudence under the Sherman Act to deal with a wide variety of issues.

Interestingly, post-employment restraints remained one of the few areas that continued to fall within the domain of common law restraints of trade. At the state level courts developed and applied the common law of restraints to post-employment restraints primarily by incorporation of the law of contract.[94] Thus, today one finds in state post-employment restraint cases many citations to Corbin, Williston and the Restatement, but little reference to the development of antitrust jurisprudence by the federal courts.

It was not until Harvey Goldschmidt's influential article[95] on post-employment restraints that federal courts began to subject covenants not to compete to Sherman Act scrutiny.[96] Thus, today there are two disparate sources of legal precedent concerning covenants not to compete: federal law under the Sherman Act and the common law of restraints of trade as developed by the states.

B. *Current Treatment under State Common Law*

Under current state common law, it is typically the case that a restrictive covenant is enforceable only if it is: (1) supported by adequate consid-

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91 *See generally id.* at 319-26.

92 *See generally id.*

93 *See* 15 U.S.C. § 1.

94 *See infra* Part I.B.

95 *See* Harvey J. Goldschmidt, *Antitrust's Neglected Stepchild: A Proposal for Dealing with Restrictive Covenants Under Federal Law*, 73 COLUM. L. REV. 1193, 1193, 1207 (1973) (noting that "federal antitrust laws, with rare and tangential exceptions, have not been applied to restrictive covenants," and "urg[ing] that the Sherman Act and Federal Trade Commission Act be used to reform the field.").

96 *See, e.g.*, Consultants & Designers, Inc. v. Butler Serv. Group, Inc., 720 F.2d 1553 (11th Cir. 1983) (applying section 1 of Sherman Act to covenant not to compete and upholding agreement); *see also* Newburger, Loeb & Co. v. Gross, 563 F.2d 1057 (2d Cir. 1977).

eration; (2) "reasonable;" and (3) ancillary to some other agreement.[97] The "reasonableness of a covenant has typically been determined by whether (i) the restraint protects a legitimate interest of the employer, not greater than necessary to protect that interest, and reasonably related to the interest being protected; (ii) the restraint does not unreasonably prevent the employee from earning a livelihood; and (iii) the restraint is in accord with public policy.[98]

Several factors determine whether or not the covenant is reasonably related to the employer's legitimate interest. Typically, however, the nature and scope of the business govern. For example, professional services such as dentists, doctors, and lawyers are usually local in nature. Restraints in these professions that are not local in nature are more likely to be declared void.[99] Distributors, in contrast, may either be local or broader (national or international) in scope depending on whether they are wholesalers or retailers and depending on the nature of the commodity they sell.[100] Finally, those companies engaged in the production, manufacture, or processing of goods may be granted more leeway in expanding the geographic scope of the restraint.[101]

The duration of the restriction also determines the reasonableness of the restraint in relation to the employer's business interest. Restraints that are unlimited in time are almost always unreasonable.[102] However, it is impossible to determine the reasonableness of a restraint with respect to its time limitation absent an examination of the particular industry in which it is being imposed. The courts' inconsistent analysis under this fact-specific nature of this inquiry has led to frustration for drafters and observers alike. As one commentator states:

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97 It is beyond the scope of this article to detail the varying degrees by which this standard is applied among all fifty states. Many states have also adopted legislation allowing for covenants not to compete. Others have adopted statutes forbidding covenants of this sort in many instances. Yet others have adopted statutes that codify the rule of reason test. For detailed discussion on a state-by-state basis, see generally DECKER, *supra* note 30. The fact that states use varying methods to deal with covenants not to compete only strengthens our arguments that the current tests are in need of reform. A multi-state or multinational corporation would have to draft many different contracts depending on the states in which they do business, increasing transaction costs. Also, employee mobility within the firm would be reduced. However, for the most part, the discussion of state common law treatment of post-employment covenants contained in this section is applicable to the majority of the states.

98 *Id.* at 44.

99 C.T. Dreschler, Annotation, *Enforceability of Covenant Against Competition, Ancillary to Sale or Other Transfer of Business, Practice or Property, As Affected By Territorial Extent of Restriction*, 46 A.L.R.2d 119 (2002).

100 *Id.*

101 *Id.*

102 *See, e.g.*, Taylor v. Saurman, 1 A. 40 (Pa. 1885) (declaring covenant not to engage in photography again void as against public policy).

> A look at the cases finds courts upholding restrictive covenants that last as long as five or ten years, while invalidating others that last only one or two years. Moreover, courts in the same jurisdiction will uphold a three-year limitation in one case but invalidate it in another. Unfortunately, in so doing the courts seldom attempt to reconcile their decisions, except perhaps by saying that each case must be decided on its own facts. In reviewing the cases, one could decide that the decisions are totally serendipitous and would not be far wrong. However, luck and good fortune are not particularly helpful when drafting clauses.[103]

The second factor, the reasonableness of the restraint to the employee, is also a rather nebulous factor insofar as many of the issues, including the geographic scope and duration of the restraint, are considered with respect to the first factor. However, potentially, other subfactors to be considered here include the nature of the employee, including her degree of expertise, good standing in the community, and whether long and costly training was involved in order to engage in her line of work.[104] Typically the greater the expertise of the employee, the greater the employer's interest must be for the court to find the restraint to be valid.[105] Also, the briefer the period of employment before termination or departure, the less likely the courts will find a sufficient interest exists on the part of the employer to enforce the restraint.[106] The circumstances surrounding the termination of employment also play a role:

> [I]f the discharge is clearly inequitable, the employer may be denied enforcement, on general equitable principles, of an otherwise reasonable restraint. On the other hand, if the employee leaves because he has been hired by a competitor as a part of a plan to divert customers or trade secrets . . . injunctive relief may issue even when, under other circumstances, the employer's interest might be regarded as insufficient to support a restraint.[107]

Whether or not the restraint "imposes undue hardship" on the person restricted is also considered.[108] Courts may take into account whether the economy is in depression, the employee's family situation, or his length of residence in a particular town.[109] While these factors may at first blush seem "fair," it is questionable whether the parties to the contract would have placed these risks in the hands of the employer.

Finally, the Courts typically consider injury to society. In early American common law, this factor was not dispositive, merely tipping the

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103 DECKER, *supra* note 30, at 127.

104 Blake, *supra* note 26, at 684 ("This seems entirely appropriate, for the loss to the individual and the economic loss to society are both greatest when a highly trained and specialized person is prevented from employing his special abilities.").

105 *Id.*

106 *Id.* at 685.

107 *Id.*

108 RESTATEMENT OF CONTRACTS § 515(b) (1913); *see also* RESTATEMENT (SECOND) OF CONTACTS § 188 (1981).

109 Blake, *supra* note 26, at 686.

scales in favor of either employer or employee.[110] However, in modern American common law, this factor may be dispositive if the restriction may harm the public.[111] Typically, this means that the restraint "tends to create, or has for its purpose to create, a monopoly, or to control prices or to limit production artificially."[112] However, the courts have typically not undertaken any sophisticated antitrust analysis to make this determination, instead relying on the number of practitioners as a rule of thumb.

In sum, the current treatment of covenants not to compete in state and federal courts suffers from a multitude of shortcomings. First, there is the stark contrast between the state and federal court approaches. Second, there are varying state court approaches, lending to a certain level of unpredictability as to whether a corporation's employment contract may be valid or void depending upon where the employee is assigned. Third, even among states that apply the common law approach described above, there is unpredictability as to the outcome of the various courts' analyses depending upon the judge applying the rule. Fourth, the outcome may not even be predictable within a state and may depend upon the judge in whose court the covenant is challenged. For these reasons, a more uniform and rigorous approach is justified.

II. THE LAW AND ECONOMICS APPROACH

Law and economics analysis can help to reconcile the various approaches of the many states and the federal courts to post-employment restraints by providing a logical, predictable method for analyzing post-employment restraints. Before turning to the final analysis we briefly introduce the basic concepts of law and economics for the uninitiated.

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110 DECKER, *supra* note 30, at 36-37.

111 Cases involving doctors are the most likely to be determined on this factor. *See, e.g.*, Nat'l Consultants, Inc. v. Burt, 366 S.E.2d 344 (Ga. Ct. App. 1988) (covenant restricting doctor from practicing in an area with few doctors); Lloyd Damsey, M.D., P.A. v. Mankowitz, 339 So. 2d 282 (Fla. Dist. Ct. App. 1976). However, the public policy factor has been applied to a broad range of cases.

112 RESTATEMENT OF CONTRACTS § 515(c) (1913). The courts do not apply antitrust principles to this issue, instead looking to the number of practitioners in the town or area of restraint. The number of practitioners may or may not bear any relation to the existence of sustainable monopoly power. Thus, the courts have been hit-and-miss as to properly voiding restraints where monopoly power exists. For examples of cases examining the public interest of covenants not to compete see, for example, Statesville Med. Group v. Dickey, 418 S.E.2d 256, 257 (N.C. Ct. App. 1992); Wilson v. Gamble, 177 So. 363 (Miss. 1937); Parisan Live Dyers & Cleaners v. Springfield, 275 S.W. 1098 (Tex. Civ. App. 1925); Ellis v. McDaniel, 596 P.2d 222 (Nev. 1979); Bauer v. Sawyer, 134 N.E.2d 329 (Ill. 1956).

A. *Basic Tenets of Law and Economics*

Law and economics analysis developed primarily in the 1960s and 1970s.[113] Its lineage can be traced to the legal realists.[114] Fundamental to law and economics analysis is the assumption that microeconomic[115] principles explain the rationale behind existing legal rules, as well as aid legal scholars in fashioning rules to achieve defined ends.[116] More specifically, the principal working hypotheses among law and economics proponents are: (1) The proper goal of the common law is the advancement of economic efficiency;[117] and (2) the common law tends to evolve toward efficient rules even if it is not conscious of that process.[118]

The goal of economic efficiency may appear to some to be overly narrow.[119] However, one need not accept the efficiency goal to find useful the analysis developed in this article: Economics can help clarify current thinking about post-employment restraints because such restraints directly concern the functioning of the market.

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113 *See* ROBERT COOTER & THOMAS ULEN, LAW AND ECONOMICS 2 (2d ed. 1997).

114 *See* James J. Heckman, *The Intellectual Roots of the Law and Economics Movement*, 15 L. & HIST. REV. 327 (1997); Herbert Hovenkamp, *Law and Economics in the United States: A Brief Historical Survey*, 19 CAMBRIDGE J. ECON. 331 (1995); Herbert Hovenkamp, *Knowledge About Welfare: Legal Realism and the Separation of Law and Economics*, 84 MINN. L. REV. 805 (2000).

115 Microeconomics is the economic theory that describes how individual actors operate within markets and how efficiency within these markets are enhanced by the behavior of the individual actors.

116 *See* COOTER & ULEN, *supra* note 113, at 3 (noting that economics provides "a scientific theory to predict the effects of legal sanctions on behavior," and "provides a useful normative standard for evaluating law and policy" and the social goals law seeks to achieve).

117 *See generally id.* at 41-42 (generally discussing Kaldor-Hicks efficiency principle); *see also* Hicks, *infra* note 121; Kaldor, *infra* note 121.

118 Herbert Hovenkamp, *The First Great Law & Economics Movement*, 42 STAN. L. REV. 993, 1015 (1993).

> An important part of the 1970s law & economics movement has been devoted to the presumed efficiency of the common law. The common law . . . may be more efficient than legislation for two reasons: (1) the common law is designed to give effect to private bargains with minimum active interference from the state . . .; and (2) common law rules tend to become precedential only to the extent that they are efficient. . . .

Id.

119 *See, e.g.*, Frank Michelman, *Reflections on Professional Education, Legal Scholarship, and the Law-and-Economics Movement*, 33 J. LEGAL EDUC. 197 (1983) (criticizing the movement's narrow focus); Duncan Kennedy, *Cost-Benefit Analysis of Entitlement Problems: A Critique*, 33 STAN. L. REV. 387 (1981) (criticizing the indeterminateness of efficiency); Ronald Dworkin, *Is Wealth A Value?*, 9 J. LEGAL STUD. 191 (1980) (criticizing efficiency as an ethical first principle); Arthur Leff, *Economic Analysis of Law: Some Realism About Nominalism*, 60 VA. L. REV. 451 (1974) (criticizing circular reasoning of Law & Economics).

1. The Efficiency Goal

The law and economics approach has adopted an efficiency criterion often referred to as wealth maximization, or the Kaldor-Hicks compensation principle.[120] A transaction is Kaldor-Hicks efficient, or wealth maximizing, if the individuals that benefit from a transaction experience a benefit that exceeds anyone else's loss, such that they can still retain a net gain after potentially compensating any individuals that experience diminished welfare.[121] Actual compensation is not required.[122]

The intuition behind wealth maximization is that efficiency can be conceived of as the maximizing of the social "pie," while distribution of the parts of the pie is a separate issue.[123] The pie is *not* the total set of goods and services in the economy.[124] Rather, the substance of the pie is "utility"

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120 *See* COOTER & ULEN, *supra* note 113, at 41; *see also* Kaldor, *infra* note 121; Hicks, *infra* note 121.

121 Any rule of law is efficient when the "winner" can potentially compensate the "loser" and remain better off. Social wealth is maximized through the application of this principle. Resources are in the hands of those who value them the most, as determined by that person's willingness and ability to pay for them. The goal of the principle is to insure that the "pie" of wealth increases, regardless of the distribution. In other words, the benefits of the transaction must exceed the costs. Posner's example illustrates this principle. Assume that A is in possession of a wood carving, then

> if A values the wood carving at $5 and B at $12, so that at a sale price of $10 (indeed at any price between $5 and $12), the transaction creates a total benefit of $7 (at a price of $10, for example, A considers himself $5 better off and B considers himself $2 better off), then it is an efficient transaction, provided that the harm (if any) done to third parties (minus any benefit to them) does not exceed $7.

RICHARD POSNER, ECONOMIC ANALYSIS OF LAW 12 (4th ed. 1990); *see also* John R. Hicks, *The Foundations of Welfare Economics*, 49 ECON. J. 696, 698 (1939) (synthesizing the basic theories behind 'welfare economics'); Nicholas Kaldor, *Welfare Propositions of Economics and Interpersonal Comparisons of Utility*, 49 ECON. J. 549 (1939) (discussing the relevance of the status of interpersonal comparisons of utility to 'welfare economics').

122 Under the theory, contracting parties need not actually compensate any third parties for losses incurred by the third parties as a result of the contract as long as the benefits of the exchange exceed the costs. POSNER, *supra* note 121, at 12. If actual compensation were required, the efficiency goal would be coextensive with Pareto Optimality. COOTER & ULEN, *supra* note 113, at 41 (discussing Pareto Doctrine); *see also* VILFREDO PARETO, MANUEL D'ECONOMIE POLITIQUE (1909). Pareto efficiency states that a situation is efficient:

> if no change from that situation could make someone better off without also making at least one other person worse off. Likewise, a given situation A is "Pareto superior" to situation B if the move from B to A does in fact make at least one person better off without making another person worse off.

Herbert Hovenkamp, *Antitrust Policy After Chicago*, 84 MICH. L. REV. 213 (1985).

123 Paula M. Taffe, *Imputing the Wealth Maximization Principle to State Legislators*, 63 CHI.-KENT L. REV. 311, 316 (1987) (noting that courts can effect the size of the economic pie, but not the distribution of the pie among economic actors).

124 Mark Glick, *Is Monopoly Rent Seeking Compatible with Wealth Maximization?*, 1994 B.Y.U. L. REV. 499, 505. For a criticism of the consistency of this view of efficiency, see Victor P. Goldberg, *On Positive Theories of Redistribution*, 11 J. ECON. ISSUES 119 (1977).

backed by purchasing power. Put differently, the pie consists of utility revealed by willingness to pay.[125] An absolutely critical corollary of the wealth-maximizing efficiency criterion is the assumption that voluntary trade between individuals results in gains to both parties to the transaction.[126] This proposition forms the basis of the most fundamental prescriptions of law and economics.[127] As a result of gains to trade, it is universally argued that entitlements should be protected by property rights when transaction costs are low.[128] Property rights force others who wish to obtain an entitlement to buy it from its holder in a voluntary transaction in the market. Such private property rules are efficient because (according to the wealth maximization criterion) voluntary transactions are expected to yield wealth gains to both individuals.[129] If one of the individuals to the transaction were a potential loser he or she would simply refuse to undertake the transaction.[130] If this were not true the case for private property rights would not follow. In contrast, liability rules, such as negligence, are only necessary when transaction costs make voluntary market transactions infeasible.[131]

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125 Glick, *supra* note 124, at 505; *see also* Steve P. Calandrillo, *Responsible Regulation: A Sensible Cost-Benefit, Risk Versus Risk Approach to Federal Health and Safety Regulation*, 81 B.U. L. REV. 957, 981 (2001).

126 Glick, *supra* note 124, at 505. The "voluntariness" of an exchange is sometimes difficult to gauge, with the extreme cause of a nonvoluntary transaction being duress. *See, e.g.*, DAVID W. BARNES & LYNN A. STOUT, CASES AND MATERIALS ON LAW & ECONOMICS 180 (1992) ("If two parties contract voluntarily and with full information, both must expect the contracted-for-exchange to improve their welfare. . . . Only when voluntary cooperation breaks down does the law intervene.").

127 *See* Oliver E. Williamson, *Transaction-Cost Economics, The Governance of Contractual Relations*, 22 J.L. & ECON. 233, 235-38 (1979); Daniel A. Farber, *Contract Law and Modern Economic Theory*, 78 NW. U. L. REV. 303, 319-322 (1983).

128 *See generally* Ronald H. Coase, *The Problem of Social Cost*, 3 J.L. & ECON. 1, 12-13 (1960) (stating that where transaction costs equal zero, bargaining will result in resources flowing to their most valued use, regardless of initial distribution, particularly when property rights well defined); *see also* Thomas W. Merrill & Henry E. Smith, *What Happened to Property in Law & Economics?* 111 YALE L.J. 357 (2001) ("With no (or low) transaction costs, what mattes most is that rights be clearly assigned."); POSNER, *supra* note 121, at 15.

129 *See, e.g.*, *supra* note 121 and accompanying text.

130 In Posner's example at *supra* note 121, suppose that A valued the wood carving at $20 while B valued it at $12. Under those circumstances, A would not likely sell the wood carving to B because B is only willing to pay less for the wood carving than the $20 for which A values the carving. Thus, no transaction will take place because A would be worse off under any price B is willing to pay.

131 *See* POSNER, *supra* note 121, at 164. This explains, for example, why negligence rules are necessary in the tort area. A tort involves strangers in a situation unlikely to be amenable to negotiation and private contract. *See generally* Guido Calabresi & A. Douglas Melamed, *Property Rules, Liability Rules, and Inalienability: One View from the Cathedral*, 85 HARV. L. REV. 1089, 1106-10 (1972). The economic explanation of liability rules also assumes that if individuals could successfully privately negotiate, then social gains would result. WILLIAM M. LANDES & RICHARD A. POSNER, THE ECONOMIC STRUCTURE OF TORT LAW (1987) (describing the underlying economic rationale of various tort concepts).

2. The Economics of Contracts

Since post-employment restraints are incorporated in employment contracts, we turn now to the economic theory behind contract formation. The economic function of contracts is to facilitate voluntary trade.[132] As described above, voluntary trade by its nature increases efficiency because it moves resources to higher valued uses.[133] Contracts are necessary to facilitate trade because exchanges between parties rarely occur simultaneously.[134] Without contractual obligations, the party performing its contractual promises first would be at risk of an exercise of opportunism or holdup by the non-performing party.[135] Contracts impose penalties for non-performance and therefore they make voluntary trade possible in an inter-temporal environment.[136]

Economists often simplify the analyses by using perfect markets as the starting point. Markets are "perfect" when perfect competition exists.[137] Perfect competition requires full information, no externalities, and a large number of small producers and consumers.[138] When markets are perfect, actors in such markets by definition execute perfect contracts.[139] A perfect contract is a contract in which all contingencies are anticipated and all risks are fully assigned by the contract provisions.[140] The contract price under such circumstances will efficiently allocate all of the risks and costs of performance.[141]

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132 "[C]ontract law is a set of rules that reduces the costs of structuring agreements in the presence of transaction costs." Thomas S. Ulen, *Firmly Grounded: Economics In the Future of the Law*, 1997 WIS. L. REV. 433, 440; *see also* Gordon Tullock, *The Logic of the Law*, *in* ANTHONY T. KRONMAN & RICHARD A. POSNER, THE ECONOMICS OF CONTRACT LAW 23-25 (1979) (stating that the law reduces transaction costs, thus reducing the time necessary for successful contractual negotiation.)

133 *See supra* note 126 and accompanying text (discussing how voluntary trade increases efficiency).

134 POSNER, *supra* note 121, at 89.

135 *Id.*

136 *Id.* at 91.

137 The notion of perfection in economics typically means "efficient." There are perhaps three definitions of efficiency relevant to perfect competition. First, economic actors seek to maximize their self-interest (utility, profits) subject to various constraints (income, resources). This is a general notion of efficiency. Second, in perfectly competitive markets, resources flow to their highest valued use. This is commonly known as allocative efficiency. Finally, perfectly competitive markets are said to be productively efficient in that they minimize the costs of production for any level of output. All three of these concepts are commonly mentioned as reasons why perfectly competitive markets are "perfect." *See id.* (discussing various concepts of efficiency).

138 F.M. SCHERER, INDUSTRIAL MARKET STRUCTURE AND ECONOMIC PERFORMANCE 11 (2d ed. 1980); *see also* COOTER & ULEN, *supra* note 113, at 29.

139 COOTER & ULEN, *supra* note 113, at 186.

140 *Id.*

141 *Id.*

Once the assumption of perfect markets is relaxed, suboptimal social outcomes can occur. In particular, economists typically consider four sources of "market failure:" (1) monopoly or monopoly power; (2) externalities; (3) informational asymmetries; and (4) public goods.[142] Briefly, monopoly power means that there is an absence of effective competition resulting in prices that deviate from costs.[143] As a consequence of monopoly or monopoly power,[144] producers generate too little output at prices that are excessively high.[145] Externalities arise when the actions of decision-making individuals affect other persons but the decision-makers are neither benefited nor damaged by the impacts they cause.[146] For example, while pollution from power plants affects the health of others, the private market does not charge the utilities for those health harms.[147] Such situations lead to suboptimal economic decisions. Similarly, when the market supplies misinformation or insufficient information, people will make poor decisions.[148] A good example arises in the used car market. Used car sellers know much more about their cars than prospective buyers, leading to the "Lemon Problem," which results in only poor quality cars being offered for sale.[149]

Finally, the problem of a public good arises when consumption of a commodity by any one person does not reduce its availability to others.[150] It

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142 *See* Darren Bush, *The "Marketplace if Ideas:" Is Judge Posner Chasing Don Quixote's Windmills?*, 32 ARIZ. ST. L.J. 1107, 1114-1120 (discussing various types of market failures).

143 For example, a single firm may offer a product for which there are no close substitutes. Alternatively, numerous suppliers may face a sole customer for their wares. In either event, the efficiencies of the market are reduced.

144 A monopoly is "a single seller offer[ing] an item for which no good substitutes are available and into which the entry of other sellers is severely restricted or even impossible." HEINZ KOHLER, MICROECONOMICS 283 (1992). However, harm to efficiency may be caused to markets without the existence of a strict monopoly—a single firm. The United States antitrust laws concern the exercise of market power or monopoly power, which is defined as "the power to control [market] prices or exclude competition." United States v. E.I. du Pont de Nemours & Co., 351 U.S. 377, 391 (1956). Monopoly power can be exercised in markets in which more than a single firm competes.

145 Prices will no longer equal the cost of production, resources will not go to their best possible use, and other barriers may prevent the dissemination of technology created by the monopolist. All of these attributes create inefficiencies. POSNER, *supra* note 121, at 277.

146 Externalities "are direct effects that the actions of some consumers or producers have on the utility of other consumers or on the output of other producers, none of whom have invited these effects." KOHLER, *supra* note 144, at 509.

147 *Id.* at 507-35; *see also* Ronald H. Coase, *The Problem of Social Cost*, 3 J.L. & ECON. 1 (1960) (discussing business activities, including pollution, that have harmful effects on others); Jerry Ellig, *The Economics of Regulatory Takings*, 46 S.C. L. REV. 595, 597 (1995) ("Air pollution and ugly neckties are examples of externalities.").

148 COOTER & ULEN, *supra* note 113, at 189.

149 *See id.*

150 Public goods are goods that tend to be inefficient for a private firm to control and are thus not susceptible to price changes. KOHLER, *supra* note 144, at 556-60.

is difficult under such conditions to finance privately the right level of production of public goods because each potential customer has an incentive to "free ride" off other consumers.[151] For example, as everyone benefits from national defense, asking taxpayers for voluntary contributions to support national defense would result in socially suboptimal funding.[152]

In the absence of perfect markets, contracts will also be imperfect. Economists view contract defenses as responses to particular types of market failure.[153] The following table classifies the correspondence of contract defenses and market imperfections:[154]

Market Imperfections	Corresponding Contract Defense
Externalities	Restraints of trade Interference with economic relations
Incomplete Information	Frustration of purpose Mutual Mistake
Constrained Choice	Unconscionability Coercion Duress Necessity

3. Restraints of Trade

A restraint of trade is a form of externality. An externality arises when the parties to a contract impose uncompensated costs on a third party (negative externality), or a third party receives an unpaid-for benefit (positive externality).[155] A restraint of trade is a particular type of negative externality that is imposed on consumers as a result of an agreement between parties.[156] For example, a price-fixing cartel is a contract between competitors

151 A "free-rider" is a person who takes advantage of or benefits from a good for which someone else has paid. *Id.* at 538.

> The name [free-rider] comes to us from the days of cattle rustling in the Old West. At one time, the ranchers of Dodge City got together to form a vigilante group to catch and hang cattle thieves. Initially, everyone contributed to the cost of a security force on horseback and its existence quickly discouraged the cattle thieves. Then individual ranchers realized that they could benefit just as much from the newly produced good—law and order—if they didn't pay their dues . . . . As more and more ranchers followed the same line of thinking, the security force collapsed and cattle rustling resumed.

Id.

152 *See id.* at 537-538.

153 COOTER & ULEN, *supra* note 113, at 121.

154 Based on *id.* at 211.

155 *See supra* note 146 and accompanying text.

156 One example from recent time is when the Department of Justice's Antitrust Division originally

that works to their mutual benefit.[157] However, the resulting price harms consumers and society as a whole.[158] Harm to consumers is what federal courts typically mean by "harm to competition."[159] Agreements between a buyer and a seller can also be mutually beneficial yet harm consumers. For example, an "exclusive dealing" agreement where a buyer agrees to purchase only from the seller can be in the buyer's and the seller's interest, yet be ultimately harmful to consumers because such an arrangement excludes competitors of the seller from the market, thereby raising prices to other consumers.[160]

Post-employment restraints can have the characteristics of an exclusive dealing arrangement. The arrangement could benefit both the employer and the employee yet impose unacceptable costs on consumers either

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brought a proceeding against Microsoft because Microsoft implemented an agreement with computer manufacturers to pay Microsoft a per-processor licensing fee that increased the cost to consumer wishing to purchase a computer with a non-Microsoft operating system. *See* United States v. Microsoft, 159 F.R.D. 318, 321 (D.D.C.), *rev'd* 56 F.3d 1448 (D.C. Cir 1995).

157 Such an agreement can only be effective if the members of the cartel possess market power and thus are able to act in concert as a monopoly. *See* JACK HIRSCHLEIFER, PRICE THEORY AND APPLICATIONS 340-41 (Prentice Hall 2d ed. 1980).

158 The price harm caused to consumers is referred to as a loss of consumer welfare and deadweight loss to society. Some consumers who were willing to pay more for a good, but who ended up paying substantially less, received a "bargain" that is known by economists as consumer welfare. DENNIS W. CARLTON & JEFFREY M. PERLOFF, MODERN INDUSTRIAL ORGANIZATION 71 (Addison Wesley Longman 3d ed. 2000) ("Consumer surplus is the amount above the price paid that a consumer would willingly spend, if necessary, to consume the units purchased."). Consumers also lose out because the cartel is not operating efficiently—it is producing less than would have been produced at the competitive level, and at higher prices. Thus, consumers also lose a portion of consumer surplus through deadweight loss, since some consumers who would have been willing to pay for the goods at prices below the cartel price can no longer afford to purchase those goods. *Id.* at 72 ("[Deadweight loss] is the welfare loss—the sum of the consumer surplus and producer surplus lost—from a deviation from the competitive equilibrium.").

159 *See* Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc., 429 U.S. 477, 488 (1977) ("The antitrust laws . . . were enacted "for the protection of competition[,] not competitors . . . .") (quoting Brown Shoe v. United States, 370 U.S. 294, 320 (1962)); *see also* Clorox Co. v. Sterling Winthrop, Inc., 117 F.3d 50, 57 (9th Cir. 1997) ("[T]he antitrust laws do not exist to protect competitors from agreements that in retrospect turn out to be unfavorable to the complaining party. The antitrust laws protect consumers by prohibiting agreements that unreasonably restrain overall competition . . . ."); Serfecz v. Jewel Food Stores, 67 F.3d 591 (7th Cir. 1995) (noting that a plaintiff's injury under the antitrust laws should be "linked to the injury inflicted upon the market, such as when consumers pay higher prices because of a market monopoly or when a competitor is forced out of the market, the compensation of the injured party promotes the designated purpose of the antitrust law—the preservation of competition.").

160 *See* Dennis W. Carlton, *A General Analysis of Exclusionary Conduct and Refusal to Deal—Why Aspen and Kodak are Misguided*, 68 ANTITRUST L.J. 659, 663 (2001) (discussing case where exclusive dealing between manufacturer and intermediary provides mutual benefits to contracting firms but may also harm competition).

through its impact on the goods market or its impact on the labor market. We explore this issue below.

B. *The Economics of Post-Employment Restraints*

1. Post-Employment Restraints in a Perfect Market: The Ideal Case

It is instructive to begin with a very simple analytic structure for post-employment restraints and then successively add more complex structure to the model, drawing out the implications of each new complication. We begin, therefore, with a hypothetical employment negotiation between an employer and a prospective employee. We assume further that markets are perfect, that both parties have full and complete information, and that there are no "externalities" or effects on third parties.

Under such assumptions, there should be little argument that a post-employment restraint should be upheld.[161] This is because both parties voluntarily entered into the contract, knowing each and every implication of the post-employment restraint, and bargained for a wage that made both parties better off in light of the impact of the restraint.[162] We can be confident that this is the case because, if the negotiation is voluntary, a party would not enter into the contract unless the post-contract state of affairs was superior.[163]

Some state court opinions, following the "employee choice" approach, begin and end their analysis by explicitly or implicitly assuming this simple state of affairs. Such courts hold that because the employee had a choice whether to enter into the employment contract or not, he or she made the choice, and consideration was paid, the post-employment restraint is enforceable like any other contract provision.[164]

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161 Implicitly we have adopted the economic efficiency criteria. *See supra* note 121 and accompanying text (discussing economic efficiency criteria).

162 *See supra* note 137 and accompanying text (discussing what constitutes a perfect market and why restraints entered into under perfect market conditions should always be enforced).

163 POSNER, *supra* note 121, at 14-15. Accordingly, economists say there are gains from voluntary trade. *See* COOTER & ULEN, *supra* note 113, at 167 ("In general, economic efficiency requires enforcing a promise if the promisor and promisee both wanted enforceability when the promise was made.").

164 *See, e.g.*, Med. Specialists, Inc. v. Sleweon, 652 N.E.2d 517, 528 (Ind. Ct. App. 1995) ("By the same token, Dr. Stemer should be able to rely on the promise made by Dr. Sleweon, a highly educated man who was under no duress when he signed the employment contract with Specialists which contained the covenant not to compete, to abide by the terms of the contract."); Davis & Warde, Inc. v. Tripodi, 616 A.2d 1384, 1387-88 (Pa. Super. Ct. 1992). In *Tripodi*, the court noted in particular the length of time it took for the employees to sign, perhaps indicating an informed and rational decision that was also backed by consideration:

This simple ideal case often does not square well with the restraint of trade or reasonableness analysis. Under the sometimes unrealistic assumptions of the ideal case, even restraints into perpetuity with worldwide scope should be enforced.

2. Post-Employment Restraints Under Incomplete Information

The next step in this article's proposed analysis is to lift some of the assumptions of perfect markets while continuing to exclude from the analysis any impact on consumers. Assume first that information is not perfect. Does the conclusion of the ideal case that restraints should always be enforced still hold? As with most issues analyzed with the tools of law and economics, it depends. If information is equally difficult to obtain for both the employer and the employee, then the conclusion of the ideal case probably holds when both parties invest in equal search costs.[165] Suppose that both the employer and the employee have equal ability to predict the future value of training received on the job. If both predict correctly, search costs are imposed on both parties, and the wage during employment will correctly reflect the cost to the employee of the post-employment restraint.[166] However, if both predict wrongly—such as where the employee believes that the training will be very valuable but it turns out to be useless because of technology changes—the employee will want to void the re-

> Davis and Warde, as we have already observed, created a new, multimillion-dollar specialty division. To protect its investment and insure the specialty division an opportunity to develop profitably without unfair competition by knowledgeable employees, the company requested Darney and Tripodi, both of whom were employees at will, to sign written contracts of employment containing covenants not to compete. Darney and Tripodi studied the agreements for several months before signing them. It cannot seriously be contended, therefore, that the covenants not to compete were foisted upon unsuspecting employees. Indeed, Darney, a vice-president and the person responsible for the day-to-day operations of DAWAR, and Tripodi, who was responsible for DAWAR's marketing and sales, were not only familiar with DAWAR's operation but had been instrumental in its creation. They, better than most, were aware of their employer's need to limit future competition until the fledgling division could get off the ground. Not only were they offered continued employment with new responsibilities, but each was given a cash payment, a guarantee of certain job benefits, including a favorable change in the employer's automobile reimbursement policy, and a guaranteed severance benefit in the event of termination, all of which were to be incorporated into a written contract of employment. This, in our judgment, is consideration sufficient to support the written contracts of employment and the restrictive covenants contained therein.

Id.

165 This assumes that the information is of equal value to both parties.

166 It could be argued that the post-employment agreement adds value. Otherwise, the employee might accept lower wages in favor of training. Alternatively, the employer might not engage in an efficient level of training in fear that the employee will leave before the investment in training can be realized.

straint, and the employer will be indifferent or want it enforced.[167] In such a case, the contract defense of mutual mistake or frustration of purpose might be employed to deal with the informational imperfection.

a. Mutual Mistake[168]

Most states recognize *mutual mistake* of material fact as a basis to rescind a contract.[169] A mutual mistake occurs when both parties, at the time of contracting, share a misconception about a basic assumption or vital fact upon which they based their agreement.[170] The mistake doctrine applies only to mistakes concerning facts, which may or may not include errors in the legal interpretation of a document.[171] Not applicable to future events,

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167 *See* George M. Cohen, *The Negligence-Opportunism Tradeoff in Contract Law*, 20 HOFSTRA L. REV. 941, 981 (1992).

> [I]f the mistake is unilateral, it is more likely that the party claiming mistake was not really mistaken at all but is simply trying to rewrite the contract. In contrast, if both parties are mistaken about the same fact, the mistake is in some sense objectively verified; it is less likely the mistaken party is making up the mistake to get out of a bad deal.

Id.

168 Note that unilateral mistake has no place in law and economics. If two parties are in error, the factual inquiry as to who is the least-cost avoider of the mistake may be prohibitive. Thus, rescission returns the parties to their initial endowment which may be a superior position to the flawed transaction. However, "where only one party is mistaken, it is reasonable to assume that he is in a better position than the other party to prevent his own error." Anthony T. Kronman, *Mistake, Disclosure, Information, and the Law of Contracts*, 7 J. LEGAL STUD. 1, 5 (1978).

169 For an articulation of mutual mistake doctrine, see RESTATEMENT (SECOND) OF CONTRACTS §§ 151-58 (1981). For the development of mutual mistake doctrine in the United States and its English and Roman antecedents, see Val D. Ricks, *American Mutual Mistake: Half-Civilian Mongrel, Consideration Reincarnate*, 58 LA. L. REV. 663 (1998). The case law surrounding mutual mistake is too numerous to cite individually. The authors' home state by itself contains a fair amount of cases involving this issue. *See, e.g.*, England v. Horbach, 944 P.2d 340, 343-45 (Utah 1997); Am. Towers Owners Ass'n v. CCI Mech., Inc., 930 P.2d 1182, 1185-87 (Utah 1996); Ward v. Intermountain Farmers Ass'n, 907 P.2d 264, 267 (Utah 1995); Guardian State Bank v. Stangl, 778 P.2d 1, 4-5 (Utah 1989); Kiahtipes v. Mills, 649 P.2d 9, 13 (Utah 1982); Mabey v. Kay Peterson Constr. Co., 682 P.2d 287, 289-90 (Utah 1984); Tanner v. District Judges, 649 P.2d 5, 6 (Utah 1982); *see also* Greene, *Mistake in the Utah Law of Contracts*, 7 UTAH L. REV. 304 (1961).

170 RESTATEMENT (SECOND) OF CONTRACTS § 151 cmt. a (1981) (stating that to constitute "mistake," an erroneous belief "must relate to the facts as they exist at the time of the making of the contract," and "[a] party's prediction or judgment as to events to occur in the future, even if erroneous, is not a 'mistake' as that word is defined here"); *see also* Neiderhauser Builders v. Campbell, 824 P.2d 1193, 1197 (Utah Ct. App. 1992) (finding possible mutual mistake because of alleged miscalculation in contract); Robert Langston Ltd. v. McQuarrie, 741 P.2d 554, 557 (Utah Ct. App. 1987) (finding mutual mistake because neither party knew accurate number of cattle being transferred); *see also* Albers v. Nelson, 809 P.2d 1194, 1198 (Kan. 1991) (mistake not shared by both parties); Cont'l Cas. Co. v. Wis. Patients Comp. Fund, 473 N.W.2d 584, 587 (Wis. Ct. App. 1991) (same issue); Gutierrez v. MBank The Woodlands, N.A., 761 S.W.2d 853, 856 (Tex. Ct. App. 1988) (same issue).

171 The Restatement provides:

mutual mistake considers what the parties knew at the moment of agreement.[172] Courts have found mutual mistake in cases involving various types of contracts, including cases surrounding employment contracts.[173] Mutual mistake could apply in the context of post-employment restraints, for instance, when employer and employee share a misconception at the moment of hiring, and the misconception endures until the termination of employment.[174]

> b. Facts include law. The rules stated in this Chapter do not draw the distinction that is sometimes made between "fact" and "law." They treat the law in existence at the time of the making of the contract as part of the total state of facts at that time. A party's erroneous belief with respect to the law, as found in statute, regulation, judicial decision, or elsewhere, or with respect to the legal consequences of [that party's] acts, may, therefore, come within these rules.

RESTATEMENT (SECOND) OF CONTRACTS § 151 cmt. b (1981); *cf. Kiahtipes*, 649 P.2d at 13 (mistakes of facts do not include mistakes as to interpretation of law).

172 *See* RESTATEMENT (SECOND) OF CONTRACTS § 151 cmt. a (1981); *see also* Terrell v. Dura Mech. Components, Inc., 934 F. Supp. 874 (N.D. Ohio 1996) (holding that waiver of rights to sue cannot be voided simply because plaintiffs predicted they would be included in settlement class); *In re* Fillion, 181 F.3d 859 (7th Cir. 1999) (refusing to rescind deed because a promise of support that comes after a gift of property cannot later be termed a condition precdent in order to make it legally valid) (applying Wisconsin law); Wooldridge v. Exxon Corp., 473 A.2d 1254 (Conn. 1984) (holding that a disappointing return on investment and mistake in predicting the future do not justify rescission); Shop 'N Save Warehouse Foods, Inc. v. Soffer, 918 S.W.2d 851 (Mo. Ct. App. 1996) (holding that withholding pertinent information from the lessee gives the lessor no grounds for rescission based upon mutual mistake).

173 *See, e.g.*, John Call Eng'g, Inc. v. Manti City Corp., 743 P.2d 1205, 1206-09 (Utah 1987) (reversing trial court's finding of mutual mistake regarding terms of duties in employment contract for engineer to design and build sewer); Creative Communications Consultants, Inc. v. Gaylord, 403 N.W.2d 654 (Minn. Ct. App. 1987) (holding employment contract not void under mutual mistake doctrine and that former employee not excused from contract's noncompete clause because of employer's breach of contract); Sierra Blanca Sales Co. v. Newco Indus., 505 P.2d 867 (N.M. Ct. App. 1972) (rejecting argument of mutual mistake as to employment contract); *see also* Maureen B. Callahan, Comment, *Post-Employment Restraints Agreements: A Reassessment*, 52 U. CHI. L. REV. 703, 722-23 (1985) (questioning how strictly courts uphold post-employment restraints in light of how courts more readily will rescind contracts for mutual mistake).

174 *See* Pathology Consultants v. Gratton, 343 N.W.2d 428 (Iowa 1984) (rejecting defense of mistake against allegation of breach of a covenant not to compete); Moore Bus. Forms, Inc. v. Wilson, 953 F. Supp. 1056, 1063 (N.D. Iowa 1996) (rejecting defense under principles established in *Gratton*); *see also* Robbins v. Finaley, 645 P.2d 623, 625-28 (Utah 1982). In *Robbins*, a case involving post-employment restraints, the Court did not invoke the doctrine of mutual mistake. *See* 645 P.2d 623. The Court, however, found it significant that the employment contract spoke to training the employee as part of the employer's consideration, yet the employee was already experienced in the field of selling hearing aids and needed no additional training. *Id.* at 625. The Court invalidated the contract's covenant not to compete in part because the employer did not invest substantial training in the employee. *Id.*

b. Frustration of Purpose

While mutual mistake considers the understandings of both parties at the inception of a contract, the doctrine of *frustration of purpose* addresses significant factual changes that alter the contract's meaning for one or both parties.[175] When a party enters into a contract, that party almost undoubtedly has a purpose for participating in the agreement. Frustration occurs if circumstances change and subject the party's purpose to "total or nearly total destruction."[176] Frustration of purpose differs from the defenses of impossibility and impracticability because performance of the contract would be possible and practicable, but pointless.[177] A doctrine in equity,[178] the defense of frustration enables a court to refuse to enforce a contract. Frustration may fail as a defense, however, if the defendant had control over the changing circumstances or if substitute performance remains valuable for the plaintiff.[179] Additionally, if the change in circumstances was reasonably foreseeable or actually foreseen, frustration does not apply.[180]

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175 The Restatement defines "frustration of purpose" as follows:

> Where, after a contract is made, a party's principal purpose is substantially frustrated without his fault by the occurrence of an event the non-occurrence of which was a basic assumption on which the contract was made, his remaining duties to render performance are discharged, unless the language or the circumstances indicate the contrary.

RESTATEMENT (SECOND) OF CONTRACTS § 265 (1981). Under frustration of purpose, "there is no impediment to performance by either party." *Id.* § 265 cmt. a. Rather "a change in circumstances makes one party's performance virtually worthless to the other, frustrating his purpose in making the contract." *Id.*; *see also* John P. Dawson, *Judicial Revision of Frustrated Contracts: the United States*, 64 B.U. L. REV. 1 (1984); Addison Mueller, *Contracts of Frustration*, 78 YALE L.J. 576 (1969); Arthur Anderson, *Frustration of Contract—A Rejected Doctrine*, 3 DEPAUL L. REV. 1 (1953); Comment, *Contracts—Frustration of Purpose*, 59 MICH. L. REV. 98 (1960).

176 RESTATEMENT (SECOND) OF CONTRACTS § 288 (1981).

177 *See id.* § 265 cmt. a.

178 *See* 7200 Scottsdale Road Gen. Partners v. Kuhn Farm Mach., Inc., 909 P.2d 408 n.3 (Ariz. Ct. App. 1995) (discussing the doctrine of frustration).

179 *See* Lloyd v. Murphy, 153 P.2d 47, 50 (Cal. 1944); *see also* Chicago, M., St. P. & P. R. Co. v. Chicago & Nw. Transp. Co., 263 N.W.2d 189, 194 (Wis. 1978) ("The contract defense of frustration requires that: (1) the parties principal purposes in making the contract is frustrated; (2) without that party's fault; (3) by the occurrence of an event, the non- occurrence of which was a basic assumption on which the contract was made.") (internal quotations omitted).

180 The Restatement only considers foreseeability as a factor in determining whether the defense should excuse performance, but does not dictate that the factor is determinative. RESTATEMENT (SECOND) OF CONTRACTS § 265 cmt. a (1981). It is not clear in many jurisdictions whether the appropriate standard is that the contingency be "reasonably foreseeable" or "actually foreseen." *Compare, e.g.*, Castagno v. Church, 552 P.2d 1282, 1283-84 (Utah 1986) *with* W. Props. v. S. Utah Aviation, 776 P.2d 656, 658-59 (Utah Ct. App. 1989). In *Castagno v. Church*, the Utah Supreme Court dismissed the argument of frustration regarding a contract to convey forty acres of realty because the change in circumstances was foreseeable and the party could have acted to prevent it. 552 P.2d at 1283. After the purchaser signed the contract and paid for twenty of the acres, including a well, the state engineer ordered the party to stop using the well. *Id.* The purchaser argued that without the well to supply water, it

Courts rarely invoke the doctrine of frustration of purpose, and parties succeed with the frustration defense even more rarely.[181] Cases in the employment realm have appeared, [182] but few raising the issue in the context of a post-employment restraint.[183] Courts could apply frustration to post-employment restraints, however, when circumstances radically alter the terms of employment. In such cases, circumstances would destroy the employee or employer's purpose in entering the employment contract, rendering employment pointless.

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would be pointless to acquire the land. *Id.* The Court, however, reasoned that the buyer knew that there was no existing water right to the well and that the buyer failed to try to obtain such a right. *Id.* at 1284. Therefore, the state forbidding the well's use was foreseeable and the party had some amount of control over the situation, so the defendant was bound by the contract. *Id.* On the other hand, in *Western Properties v. Southern Utah Aviation, Inc.*, the Utah Court of Appeals held that a tenant was released from paying rent because it was unforeseeable that the city would disapprove developing the real estate. 776 P.2d at 659. The tenant entered the lease, which provided that the tenant would construct a building on the site. *Id.* at 657. The Court found that the parties tacitly assumed the municipal government would cooperate with the development of the land, but the city did not cooperate and instead forbade building at that location. *Id.* at 659. Finding this change in circumstances unforeseen, the Court dissolved the lease. *Id.*

181 *See* John D. Wladis, *Impracticability as Risk Allocation: The Effect of Changed Circumstances Upon Contract Obligations for the Sale of Goods*, 22 GA. L. REV. 503, 504 n.2 (1988) (noting that most courts never apply frustration of purpose); Nicholas R. Weiskop, *Frustration of Contractual Purpose—Doctrine or Myth?*, 70 ST. JOHN'S L. REV. 239, 242 (1996).

> It is only when one searches for decisional holdings squarely based on frustration grounds that doubts emerge as to whether we are dealing with true legal doctrine or shibboleth. Based on the [cases the author summarizes], the inescapable conclusion is that the courts typically do not permit purchasers of goods and services to escape contractual liability because of supervening frustration of bargaining objective unless, of course, the parties are found to have so agreed.

Id.; *see also* Warner v. Lucas, 541 N.E.2d 705, 707 (Ill. App. Ct. 1989) (noting the defense to be an "extreme exception[] . . .to the fundamental rules that a validly entered contract is to be enforced as written, and as such, [is] not to be applied liberally.")

182 See *Diston v. EnviroPak Med. Prods.*, 893 P.2d 1071, 1077-78 (Utah Ct. App. 1995), involving an employer who went out of business and terminated employee who had a three-year employment contract. The employee sued for three years of lost earnings, and the employer argued that going out of business frustrated the purpose of the employment contract. *Id.* at 1077. Reasoning that the employer had control over its decision to cease operations and that its own dissolution was not a fortuitous event, the court dismissed the frustration argument and found for the plaintiff-employee. *Id.* at 1077-78; *see also* Tavormina v. Timmeny, 561 So. 2d 681, 683 (Fla. Dist. Ct. App. 1990) (refusing to apply doctrine when contract provision contemplated event).

183 Ross Clinic, Inc. v. Tabion, 419 N.E.2d 219, 223 (Ind. Ct. App. 1981) (holding that frustration of purpose was improperly raised as a defense to an action for breach of a contract containing a covenant not to compete where the defense has not been recognized by the state supreme court).

3. Post-Employment Restraints Under Asymmetric Information

A more difficult situation arises when one party makes expenditures to engage in informational search and the other party does not. Suppose the employer knows more about the relevant market than the employee. The employer could take advantage of this fact to impose a restraint on an employee that is uncompensated for by the wage agreement.[184] It might be argued that if such information is equally available to both the employer and employee, then a rule that enforces the restraint, as opposed to mutual mistake, will create incentives for employees to engage in efficient levels of search.[185]

The situation where search costs are unequal is more difficult. It may not be unreasonable to assume that employers can spread the costs of search over many employees, while the employee does not have such economies of scale available. This is a type of unequal bargaining power. In such circumstances, it may be more efficient to have courts limit post-employment restraints rather than force employees to undertake expensive search costs.[186] Court-imposed limits could cause employers to invest in market information yet limit their overreaching.[187] The proper legal doctrine to invoke in this situation might be *fraud*[188] (as in *culpa in contra-*

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184 For examples not in the employment context, see COOTER & ULEN, *supra* note 113, at 273.

185 *Id.* Cooter and Ulen suggest that contracts "should be enforced if doing so rewards discovery and unites knowledge with control." *Id.* In a situation where both parties of equally adept at acquiring knowledge, no particular party has control over the relevant information. *Cf.* Kronman, *supra* note 168, at 32 (proposing that information deliberately acquired, as opposed to casually collected, should be subject to disclosure).

186 Michael J. Trebilcock, *Asymmetric Information Imperfections*, *in* THE LIMITS OF FREEDOM OF CONTRACT 112 (1993) (proposing "a general presumption in favour of disclosure of material facts known to one party and unknown to the other," subject to exceptions wherever "enforced disclosure [will] reduce incentives for parties to generate and utilize the information in the first place.").

187 *See also* COOTER & ULEN, *supra* note 113, at 273 (noting distinction between information that creates wealth and information that merely redistributes it and arguing that the state should not create incentives for information gathering that results in the latter); Robert L. Birmingham, *The Duty to Disclose and the Prisoner's Dilemma:* Laidlaw v. Organ, 29 WM. & MARY L. REV. 249, 269 (1988) (suggesting that investment in information may not be efficient).

188 *See* Lowry Computer Prods., Inc. v. Head, 984 F. Supp. 1111, 1115 (E.D. Mich. 1997). In *Lowry*, the defendant employee argued that she was fraudulently induced to sign the noncompete agreement because (1) she was told to sign immediately or risk losing her job; (2) a representative of the employer told her that the noncompete provision was not enforceable. *Id.* The court dismissed this argument, stating:

> It is not clear exactly what was said to the . . . employees, but defendant is a relatively sophisticated party, and she should be held to the terms of the agreement. She clearly had the right to consult an attorney before signing the agreement, which she failed to do. If defendant accepted the oral representations of a senior Lowry sales executive that the agreements were not enforceable against California employees, a fact which is not at all indicated by the terms of the agreement, then defendant must bear some of the responsibility for the consequences of that erroneous belief. Moreover, this court finds that defendant's reliance on secondhand

hendo)[189] or *failure to disclose*.[190] Generally, such doctrines are affirmative defenses that are raised by a party seeking to avoid enforcement of a contract, and are meant to protect the individual contracting party.[191]

> information to the effect that employees could still accept jobs with competitors was unreasonable in light of the circumstances of this case.

Id. at 1115; *see also* Earthworks, Inc. v. Sehn, 553 N.W. 2d 490, 495 (N.D. 1996) (upholding dismissal of claim by seller of a business that buyer fraudulently induced him to enter into the sale by allocating an amount to the noncompete covenant that was supposed to be allocated to physical assets). Interestingly enough, the claim of fraud may be used offensively against an employee who never intends to abide by the restrictive covenant. *See In re* Harland, 235 B.R. 769, 776-77 (Bankr. E.D. Pa. 1999) (suggesting that while agreeing to a restrictive covenant while simultaneously intending never to honor it may constitute fraud under Missouri law, it does not constitute fiduciary fraud).

189 The doctrine means that "damages should be recoverable against the party whose blameworthy conduct during negotiations for a contract brought about its invalidity or prevented its perfection." Friedrich Kessler & Edith Fine, *Culpa in Contrahendo, Bargaining in Good Faith, and Freedom of Contract: A Comparative Study*, 77 HARV. L. REV. 401 (1964); *see also* 4 JAHRBUCHER FUR DIE DOGMATIK DES HEUTIGEN ROMISCHEN UND DEUTSCHEN PRIVATRECHTS 1 (1861), *reprinted in* 1 RUDOLF VON JHERING, GESAMMELTE AUFSATZE 327 (1881). For discussion of von Jhering's article, see 1 Samuel WILLISTON, A TREATISE ON THE LAW OF CONTRACTS § 63A (1936).

190 *See* RESTATEMENT (SECOND) OF TORTS § 551 (1977), which states:

> 551. LIABILITY FOR NONDISCLOSURE
>
> (1) One who fails to disclose to another a fact that he knows may justifiably induce the other to act or refrain from acting in a business transaction is subject to the same liability to the other as though he had represented the nonexistence of the matter that he has failed to disclose, if, but only if, he is under a duty to the other to exercise reasonable care to disclose the matter in question.
>
> (2) One party to a business transaction is under a duty to exercise reasonable care to disclose to the other before the transaction is consummated,
>
> (a) matters known to him that the other is entitled to know because of a fiduciary or other similar relation of trust and confidence between them; and
>
> (b) matters known to him that he knows to be necessary to prevent his partial or ambiguous statement of the facts from being misleading; and
>
> (c) subsequently acquired information that he knows will make untrue or misleading a previous representation that when made was true or believed to be so; and
>
> (d) the falsity of a representation not made with the expectation that it would be acted upon, if he subsequently learns that the other is about to act in reliance upon it in a transaction with him; and
>
> (e) facts basic to the transaction, if he knows that the other is about to enter into it under a mistake as to them, and that the other, because of the relationship between them, the customs of the trade or other objective circumstances, would reasonably expect a disclosure of those facts.

See also Restatement section 161, which indicates that:

> A person's non-disclosure of a fact known to him is equivalent to an assertion that the fact does not exist in the following cases only:
>
> (a) where he knows that disclosure of the fact is necessary to prevent some previous assertion from being a misrepresentation or from being fraudulent or material.
>
> (b) where he knows that disclosure of the fact would correct a mistake of the other party as to a basic assumption on which that party is making the contract and if non-disclosure of the fact amounts to a failure to act in good faith and in accordance with reasonable standards of fair dealing.
>
> (c) where he knows that disclosure of the fact would correct a mistake of the other party as to the contents or effect of a writing, evidencing or embodying an agreement in whole or in part.

4. Post-Employment Restraints Under Constrained Choice

a. Unconscionability

From an efficiency perspective, unconscionability is a valid rationale for refusing to enforce a contract only in limited instances, with the efficiency outcome hinging upon whether the unconscionability is procedural or substantive.[192] Procedural unconscionability has a greater likelihood of withstanding Law & Economics scrutiny than substantive unconscionability.[193] Procedural unconscionability[194] enables the defendant to raise the specter of fraud or duress without meeting the specific elements for each claim.[195] This reduces the cost to defendants who have been harmed.[196] In this light, procedural unconscionability does little more than allow the courts to increase their ability to police contract law.

More specifically, procedural unconscionability refers to relative unfairness in the negotiating process.[197] The key elements here are oppression

(d) where the other person is entitled to know the fact because of a relation of trust and confidence between them.

191 *See, e.g.*, Klein v. Terminal R.R. Ass'n of St. Louis, 268 S.W. 660, 664 (Mo. Ct. App. 1925) ("Fraud is an affirmative defense and must be proved. It is never presumed.").

192 The distinction between procedural and substantive unconscionability can be traced to Arthur Leff, *Unconscionability and the Code—The Emperor's New Clause*, 115 U. PA. L. REV. 485, 487 (1967). Whether or not the distinction is meaningful has been the source of debate. *See* Michael J. Phillips, *Unconscionability and Article 2 Implied Warranty Disclaimers*, 62 CHI.-KENT L. REV. 199, 216 (1985) (arguing that distinction is meaningful); *see also* WXON-TV, Inc. v. A.C. Nielsen Co., 740 F. Supp. 1261, 1264 (E.D. Mich. 1990) (interpreting Michigan law to require substantive and procedural unconscionability); Master Lease Corp. v. Manhattan Limo., Ltd., 580 N.Y.S.2d 952, 953-54 (N.Y. App. Div. 1992) (interpreting New York law to require both substantive and procedural unconscionability); Rite Color Chem. Co. v. Velvet Textile Co., 411 S.E.2d 645, 648-49 (N.C. Ct. App. 1992) (holding that both substantive and procedural unconscionability are required); Collins v. Click Camera & Video, Inc., 621 N.E.2d 1294, 1302 (Ohio Ct. App. 1993) (holding that a "quantum" of both substantive and procedural unconscionability is required under Ohio law).

193 Professor Richard Epstein suggests that unconscionability, if properly applied, serves the same purpose as the Statute of Frauds or the parol evidence rule. Richard Epstein, *Unconscionability: A Critical Reappraisal*, 18 J.L. & ECON. 293, 293-94 (1975) (stating that the Statute of Frauds requires certain agreements to be in writing, while the parol evidence rule prohibits use of oral evidence to contradict terms of integrated contract).

194 Defined in Craig Horowitz, *Reviving the Law of Substantive Unconscionablity: Applying the Implied Covenant of Good Faith and Fair Dealing to Excessively Priced Consumer Credit Contracts*, 33 UCLA L. REV. 940, 944-46 (1986).

195 Epstein, *supra* note 193, at 302.

196 *Id.*

197 *See* Horowitz, *supra* note 194, at 944.

and surprise.[198] Oppression "arises from an inequality of bargaining power which results in no real negotiation and an absence of meaningful choice."[199] Surprise "involves the extent to which the supposedly agreed-upon terms of the bargain are hidden in a prolix printed form drafted by the party seeking to enforce the disputed terms."[200]

The first prong refers to an absence of meaningful choice. Generally, the determination of meaningful choice is made by examining the circumstances surrounding the transaction, and "[i]n many cases the meaningfulness of the choice is negated by a gross inequality of bargaining power.'"[201] Many courts have established factors to examine in order to make this determination. Utah courts, for example, have noted six non-dispositive factors as being relevant to determining whether there is procedural unconscionability.[202] These six factors are:

> (1) whether each party had a reasonable opportunity to understand the terms and conditions of the agreement; (2) whether there was a lack of opportunity for meaningful negotiation; (3) whether the agreement was printed on a duplicate or boilerplate form drafted solely by the party in the strongest bargaining position; (4) whether the terms of the agreement were explained to the weaker party; (5) whether the aggrieved party had a meaningful choice or instead felt compelled to accept the terms of the agreement; and (6) whether the stronger party employed deceptive practices to obscure key contractual provisions.[203]

Conversely, for Law & Economics, substantive unconscionability should not matter.[204] Procedural unconscionability, however, can be 'piggy-backed' upon formation issues that merit scrutiny because they tend to re-

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198 *See* A&M Produce v. FMC Corp., 186 Cal. Rptr. 114, 121-22 (Cal. App. 1982).

199 *Id.* (quoting Williams v. Walker-Thomas Furniture Co., 350 F.2d 445, 449 (D.C. Cir. 1965).

200 *Id.*

201 *See id.* (quoting *Williams*, 350 F.2d at 449).

202 *See* Ryan v. Dan's Food Stores, Inc., 972 P.2d 395, 403 (1998) (citing Sosa v. Paulos, 924 P.2d 357, 362 (Utah 1996)).

203 *Id.*

204 "If unconscionability means that a court may nullify a contract if it considers the consideration inadequate or the terms otherwise one-sided, the basic principle of encouraging market . . . transactions . . . is . . . compromised." POSNER, *supra* note 121, at 116. However, two authors have argued that unconscionability can be efficient. *See* F.H. Buckley, *Three Theories of Substantive Fairness*, 19 HOFSTRA L. REV. 33, 35 (1990) ("The imposition of substantive fairness norms may then be defended for the efficiencies they serve. . . ."); Melvin Eisenberg, *The Bargain Principle and its Limits*, 95 HARV. L. REV. 741, 748 (1982) (stating that in an imperfect market, limits on a bargained for agreement, based on the quality of that bargain, are appropriate). The position taken by Buckley and Eisenberg is contrary to standard Law & Economics thinking regarding unconscionability. *See* Epstein, *supra* note 193, at 294 (stating that the doctrine of unconscionability should not be used to set aside agreements whose substantive terms are found to be objectionable by courts); POSNER, *supra* note 121, at 138 ("The economist recognizes no limitations on [freedom of contract] other than those of incapacity, fraud, duress, monopoly, and externality. Consequently he rejects usury laws, the expansive contemporary conception of unconscionability, and the prohibition of contract penalty clauses.").

duce social wealth. Substantive unconscionability has no such redeeming value. Instead, because its definition[205] is ambiguous,[206] the 'unconscion-

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205 According to the Uniform Commercial Code (U.C.C.):

> The basic test is whether . . . the clauses involved are so one-sided as to be unconscionable under the circumstances existing at the time of the making of the contract. . . . The principle is one of the prevention of oppression and unfair surprise . . . and not of disturbance of allocation of risks because of superior bargaining power.

U.C.C. § 2-302 cmt. 1 (1998). In practice, it is probably difficult to distinguish between oppression and allocation of risks because an allocation of risk may not seem bargained for in an adhesion contract. Nevertheless, while superior bargaining power (*i.e.*, "one-sidedness") is an insufficient, although necessary, condition for a finding of unconscionability, the additional elements are not particularly clear. Calamari and Perillo suggest that one element might be a "lack of meaningful choice." JOHN D. CALAMARI & JOSEPH M. PERILLO, THE LAW OF CONTRACTS 407 (3d ed. 1987). To an economist, a lack of meaningful choice seems like a surrogate for monopoly power, but this is not clear in reading U.C.C. section 2-302. Indeed, as one commentator has suggested, "if reading . . . [section 2-302] makes anything clear it is that reading [the] section alone makes nothing clear about 'unconscionability' except perhaps that it is pejorative." Leff, *supra* note 192, at 487.

Similarly, Corbin's test for unconscionability looks at whether the terms are "so extreme as to appear unconscionable according to the mores and business practices of the time and place." 1 ARTHUR CORBIN, CORBIN ON CONTRACTS § 128 (1963). However, Corbin does not answer whether an industry's practices can be unconscionable even if followed as a standard business practice.

The Restatement's comments suggest that while "[i]nadequacy of consideration does not by itself invalidate a bargain, but gross disparity in the values exchanged may be an important factor in a determination that a contract is unconscionable and may be sufficient ground, without more, for denying specific performance." RESTATEMENT (SECOND) OF CONTRACTS § 208 cmt. c (1981). The Restatement also states that:

> A bargain is not unconscionable merely because the parties to it are unequal in bargaining position, nor even because the inequality results in an allocation of risks to the weaker party. But gross inequality of bargaining power, together with terms unreasonably favorable to the stronger party, may confirm indications that the transaction involved elements of deception or compulsion, or may show that the weaker party had no meaningful choice, no real alternative, or did not in fact assent or appear to assent to the unfair terms. Factors which may contribute to a finding of unconscionability in the bargaining process include the following: belief by the stronger party that there is no reasonable probability that the weaker party will fully perform the contract; knowledge of the stronger party that the weaker party will be unable to receive substantial benefits from the contract; knowledge of the stronger party that the weaker party is unable reasonably to protect his interests by reason of physical or mental infirmities, ignorance, illiteracy or inability to understand the language of the agreement, or similar factors.

§ 208 cmt. d. These factors, while less ambiguous than the U.C.C. language, are unhelpful. Why should A calculate the probability that B should fail to perform? What if B is a risk-taker and thus perceives the likelihood of success to be higher than A would calculate? Similarly, how could A possibly know which benefits B will receive from the contract? For example, if A is a millionaire, she will unlikely be able to discern what value a clock radio has to B, a person in poverty. Similarly, while the factor describing mental infirmities mirrors incompetence protection, why should A be required to discern whether B is illiterate? What if B, ashamed of his illiteracy, tells A that he fully understands the terms of the contract? Should A require B to pass a reading test? The Restatement seems to want A to act as an arms-length negotiator while simultaneously wanting A to protect B.

206 Substantive unconscionability has no clear specific elements because its form is nebulous and open to broad interpretation. *See* A&M Produce Co. v. FMC Corp., 135 Cal. App.3d 473, 486-87 (1982) (stating that there is no precise definition of substantive unconscionability). Thus, unconscionability takes a form equivalent to Justice Stewart's view of pornography. *See* Anthony Chase, *Race Culture,*

ability' of a particular term or contract is highly subjective. Lacking any clear rule to follow, a judge will likely define unconscionability based on his or her personal views.[207] Thus, a wealth-maximizing contract may be stripped of its value by the removal of a particular term or by voiding the contract.[208]

No court has held, however, that procedural unconscionability is sufficient to rend a contract unenforceable, and typically require both to be present.[209] Thus, it is unlikely that a claim of procedural unconscionability will succeed absent substantive unconscionability. Moreover, a claim of procedural and substantive unconscionability may have serious defects that will not overcome judicial scrutiny.[210]

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and Contract Law: From the Cottonfield to the Courtroom, 28 CONN. L. REV. 1, 38 (1995) ("Defining unconscionability is like defining obscenity: one knows it when one sees it.").

207 G. Richard Shell, *Contracts in the Modern Supreme Court*, 81 CAL. L. REV. 433, 496-97 (1993) (stating that doctrines such as unconscionability "give judges discretion over private transactions"); *see also* Asifa Quraishi, *From Gasp to Gamble: A Proposed Test for Unconscionability*, 25 U.C. DAVIS L. REV 187, 202-04 (1991) (noting the vagueness of unconscionability standard and lack of guidance provided in caselaw).

208 "[W]hen the doctrine of unconscionability is used in its substantive dimension . . . it serves only to undercut the private right of contract in a manner that is apt to do more social harm than good." Epstein, *supra* note 193, at 315.

209 *See* Horowitz, *supra* note 194, at 946.

210 The mixed success that plaintiffs have before the courts suggests perhaps that the more the plaintiff fits the role of the rational actor, the less likely that the relief sought will be granted. *See* Stewart McCaulay, *Bambi Meets Godzilla: Reflections on Contracts Scholarship and Teaching vs. State Unfair and Deceptive Trade Practices and Consumer Protection Statutes*, 26 HOUS. L. REV. 575, 583 (1989) (suggesting that unconscionability has faded as a viable contract defense and has been replaced by state trade protection statutes). For example, McCaulay points out that business people repeatedly assert unconscionability, and most lose. *Id.* at 579 n.24. In some instances, unconscionability is no longer viewed as a viable defense because the business people attempting to assert it have been paragons of the economically rational actor. *See* Kansas City Structural Steel Co. v. L. G. Barcus & Sons, Inc., 535 P.2d 419, 424 (Kan. 1975) ("None of the parties here involved were neophytes or babes in the brambles of the business world."); Bowlin's, Inc. v. Ramsey Oil Co., Inc., 662 P.2d 661, 668-69 (N.M. Ct. App. 1983). The court in *Bowlin's* stated:

> Most parties who assert 2-302 and most who have used it successfully in reported cases have been consumers. Most of these successful consumer litigants have been poor or otherwise disadvantaged. Since much current literature suggests that the low-income consumer is often the victim of sharp practices, it is not surprising that the targets of the unconscionability doctrine are usually plaintiff-creditors and credit sellers. The courts have not generally been receptive to pleas of unconscionability by one merchant against another. Presumably, few businessmen and middle-class cash purchasers are victims of the kinds of gross advantage-taking that usually calls forth 2-302.

Id. Courts tend to be less paternalistic of business people than impoverished people. Unconscionability claims are still successfully raised by non-Wall Street types. *See* McCaulay, *supra* note 210, at 583 (indicating that farmers have done well raising unconscionability issues). In addition, defendants have successfully raised unconscionability in contracts with mandatory arbitration agreements. *See, e.g.*, Doctor's Assoc., Inc. v. Casarotto, 517 U.S. 681, 654 (1996) (holding that unconscionability is applicable to arbitration agreements); Stirlen v. Supercuts, Inc., 60 Cal. Rptr. 2d 138, 159 (Cal. Ct. App. 1997)

With the foregoing in mind one might be able to imagine a hypothetical scenario where the doctrine of unconscionability could be utilized to bar enforcement of a post-employment covenant not to compete.[211] The basic argument would go something like this: The employee seeks a job with an employer in a high-technology industry. One of the conditions of employment the employee signs an employment contract. Part of the contract includes the rate of pay and a post-employment restrictive covenant. The rate of pay is set by the employer and is for all intents and purposes non-negotiable. The post-employment restraint is a standard covenant employed by the employer, the terms of which are also non-negotiable. The restraints are basic, requiring that if employment is terminated for any reason, by

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(holding a compulsory arbitration clause to be substantively and procedurally unconscionable); Patterson v. ITT Consumer Fin. Corp., 18 Cal. Rptr. 2d 563, 567 (Cal. Ct. App. 1993) (holding that arbitration provision was unconscionable and thus unenforceable); Fritz v. Nationwide Mut. Ins. Co., No. 1369, 1990 WL 186448, at *6 (Del. Ch. Nov. 26, 1990) (holding a compulsory arbitration clause solely against the insured to be unconscionable). Unconscionability can also be successful in contracts in which a plaintiff attempts to limit damages. *See, e.g.*, Walker v. Am. Cyanamid Co., 948 P.2d 1123, 1130 (Idaho 1997) (holding a disclaimer of consequential damages in fertilizer sale unconscionable); Adams v. Am. Cyanamid Co., 498 N.W.2d 577, 590 (Neb. Ct. App. 1992) (holding same); Sosa v. Paulos, 924 P.2d 357, 364-65 (Utah 1996) (holding a clause requiring patient to repay physician's attorney's fees to be unconscionable, if the patient's award in a malpractice claim was less than half of damages sought); Art's Flower Shop, Inc. v. Tel. Co. of W. Va., 413 S.E.2d 670, 675 (W. Va. 1991) (holding a contract limiting damages for failure to place yellow advertisement to twice the cost of advertisement unconscionable). Unconscionability may still be used if the process or substance of negotiation seems particularly egregious to the court. *See, e.g.*, Ilkhchooyi v. Best, 45 Cal. Rptr. 2d 766, 775 (Cal. Ct. App. 1995) (holding a profit sharing clause unconscionable); Family Fin. Servs., Inc. v. Spencer, 677 A.2d 479, 485 (Conn. 1996) (holding a mortgage between a non-English speaker and a mortgage company unconscionable); Waters v. Minn. Ltd., 587 N.E.2d 231, 234 (Mass. 1992) (holding the assignment of an $189,000 annuity for $50,000 unconscionable); Leasefirst v. Hartford Rexall Drugs, Inc., 483 N.W.2d 585, 588 (Wis. Ct. App. 1992) (holding a forum selection clause unconscionable). Finally, unconscionability is also sometimes raised in addition to consumer protection acts. *See, e.g.*, Walker v. Winks Furniture, 640 N.Y.S.2d 428, 430 (N.Y. Sup. Ct. 1996) (holding a furniture sales contract to be unconscionable, in part, where the store failed to deliver on the date promised and failed to cancel the contract without imposing a cancellation fee).

211 For an argument in favor of using unconscionability to examine covenants not to compete, see Timothy D. Scrantom & Cherie Lynne Wilson, *Postemployment Covenants Not to Compete in South Carolina: Wizards and Dragons in the Kingdom*, 42 S.C. L. REV. 657 (1991); Kathryn J. Yates, *Consideration For Employee Noncompetition Covenants in Employments At Will*, 54 FORDHAM L. REV. 1123, 1127 (1986).

> The proper analysis of noncompetition covenants in employments at will should address two separate problems: whether there is consideration to support the covenant, and whether it is fair under the particular circumstances of the case to enforce a covenant that is presented after the employment relationship is already established. The first problem is one of contract formation, the second of unconscionability or avoidance due to coercion.

Id.; *see also* Jordan Leibman & Richard Nathan, *The Enforceability of Post-Employment Noncompetition Agreements Formed After At-Will Employment has Commenced: The "Afterthought" Agreement*, 60 S. CAL. L. REV. 1465, 1552 (1987).

either the employee or the employer, the employee will not engage in employment or otherwise engage in the same industry and area for at least five years. The covenant contains absolutely no restrictions on the employer. The employee knows that all technology industries in the area utilize similar agreements and feels he or she has no choice but to accept the terms or remain unemployed. The employee agrees to the covenant and accepts employment. After termination, the employee seeks to invalidate the covenant in order to secure employment with a competing firm and challenges the validity of the post-employment restraint based on unconscionability.

The employee first argues that the covenant is substantively unconscionable because it is unfair and oppressive to the employee and unfairly benefits the employer. As support for this argument the employee would point out that the covenant absolutely precludes him or her from employment in a given field and area for a substantial period of time, while the employer suffers no detriment. The employee would argue that although the salary may have been higher in exchange for the restriction the increased wage did not adequately compensate for the severity of the restrictions and the one-sidedness of the covenant's terms, essentially arguing that there is substantial cost-benefit disparity in the agreement.[212] Finally, the employee would argue it is unfair to uphold the contract where it applies to termination by the employer because the employee has no control over the employer's conduct, especially in employment at-will states,[213] and that it is unfair and oppressive to allow an employer to fire the employee at will and subsequently foreclose the possibility of equivalent employment elsewhere. Essentially, the employee would argue that the terms are so one-sided and unfair to him or her that there is a grave sense of injustice.

The analysis would then move to procedural unconscionability. The employee would argue first that the terms of both the wage and covenant itself were non-negotiable. Second, the employee would contend that the covenant was part of a pre-printed or pre-determined employment contract that all employees were forced to sign without question. Third, the employee would argue that although the terms of the covenant and the employee's obligations under it were explained to the employee at the time of employment, he or she had no meaningful choice but to accept the terms or forgo necessary employment with the desired company and in the desired field. There may also be an argument that the employer presented the contract, including the covenant, to the employee only after he or she had accepted the position and declined other offers—for instance, on the first day

212 *See* Res. Mgmt. Co. v. Weston Livestock & Ranch Co., 706 P.2d 1028, 1041-42 (Utah 1985) (discussing how evidence of cost-price disparity might evidence substantive unconscionability).

213 *See* Lorraine K. Phillips, *The Legal Chokehold: Professional Employment in Ohio Under the Employment-At-Will Doctrine*, 24 AKRON L. REV. 581, 582 (1991) (noting that two-thirds of the American workforce is governed by the employment-at-will doctrine).

of work during orientation—and that such conduct was deceptive and coercive, leaving the employee no reasonable choice but to accept the terms.

While such a hypothetical situation appears, on its face, to fit nicely within the unconscionability framework, there are many defects with the employee's argument. To begin with, it is unlikely that a court will consider the terms of a covenant not to compete substantively unconscionable. First of all, the mere fact that a contract unfairly benefits one party, or in some way creates an imbalance, does not rise to the level of substantive unconscionability. Some courts have recognized that "[t]he law enables parties to freely contract, establishing terms and allocating risks between them," and that "[t]he law even permits parties to enter into unreasonable contracts or contracts leading to hardship on one party."[214] Further, the courts have recognized that part of the substantive unconscionability determination depends on the "mores and business practices of the time and place," and in the employment setting, especially in high-technology industries, post-employment restrictions are common.[215] Further, it is questionable that the employer receives all the benefit and no assumes no risk. The employee receives a higher wage as a result of the restriction and the employer runs the risk that the employee will remain with the company at that higher rate beyond the time estimated to compensate for the restrictions. Generally, a finding of substantive unconscionability requires a high level of unfairness and oppression and such a level is unlikely to be found in post-employment restraint situations.

Looking to procedural unconscionability, application in the employment setting seems almost impossible in the courts. For example *Ryan v. Dan's Foods Stores*,[216] presents us with the most glaring example. In the 1998 *Ryan* case, the Utah Supreme Court strongly rejected the argument

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214 *See* Ryan v. Dan's Food Stores, 972 P.2d 395 (Utah 1998) (refusing to find on behalf of terminated pharmacists that at-will employment clause in employment contract, and the employees signed acknowledgment thereof, was unconscionable, either substantively or procedurally); *see also* Northside Hosp., Inc. v. McCord, 537 S.E.2d 697, 699 (Ga. Ct. App. 2000) ("'[A]ll people who are capable of contracting shall be extended the full freedom of doing so if they do not in some manner violate the public policy of this state.'") (quoting Cash v. Street & Trail, Inc., 221 S.E.2d 640 (Ga. Ct. App. 1975)); Prairie Eye Center, Ltd. v. Butler, 713 N.E.2d 610 (Ill. App. Ct. 1999) (noting that in upholding a postemployment covenant, "[t]he trial court was concerned enforcing the covenant will inhibit trade. An equally important public policy in Illinois is the freedom to contract . . . .") (citing McClure Eng'g Assocs., Inc. v. Reuben H. Donnelly Corp., 447 N.E.2d 400, 402 (Ill. 1983)); Uncle B's Bakery, Inc. v. O'Rourke, 920 F. Supp. 1405, 1423 (N.D. Iowa 1996) ("[T]he principle of freedom of contract is entitled to some precedence where courts have accepted certain restraints on trade."); Weber v. Tillman, 913 P.2d 84, 89 (Kan. 1996) ("[T]he paramount public policy is that freedom of contract is not to be interfered with lightly.").

215 *See Ryan*, 972 P.2d 395; *see also* Sosa v. Paulos, 924 P.2d 357, 361 (Utah 1996).

216 972 P.2d 395 (Utah 1998) (refusing to find on behalf of terminated pharmacists that at-will employment clause in employment contract, and the employees signed acknowledgment thereof, was unconscionable, either substantively or procedurally).

that an employment agreement is unconscionable because it is drafted by the employer, found on a pre-printed form, and non-negotiable.[217] The court noted that "[a]lmost all employment contracts are drafted by the employer," and that "standard forms . . . are common for employment contracts."[218] Rejecting any argument that an unfavorable employment contract term renders the employee without meaningful choice, the *Ryan* court noted that if the employee is unhappy with the terms offered by the employer the employee can either refuse to accept or quit employment and find a job with more favorable terms.[219] The court essentially held that the desire or financial need to obtain or keep a certain job, at a certain time, will not alone be sufficient to render a decision without meaningful choice. Finally, the *Ryan* court held that when an employer has fully explained the terms of an employment contract and the employee has adequate capability to understand such terms, the covenant probably is not unconscionable.[220] *Ryan* demonstrates the unlikelihood that courts would find a covenant not to compete procedurally unconscionable, and although a contract may be voidable based on substantive unconscionability alone,[221] it is unlikely that courts would deem the terms of most post-employment restraints even substantively unconscionable.[222]

217 *Id.* at 404 (holding that although "the acknowledgment form was printed on a duplicate form drafted solely by Dan's," and "Ryan did not have an opportunity to negotiate the at-will term," that "these factors alone do not render the acknowledgment form unconscionable.").

218 *Id.*

219 *Id.* (stating that "[a]lthough Ryan may have wanted to work at Dan's, he was free to seek employment with another pharmacy . . . .").

220 *Id.* (holding that the contract was not procedurally unconscionable because Dan's had adequately explained and informed Ryan of its terms and Ryan appeared to understand them when signing).

221 *See id.* at 402 (acknowledging that "substantive unconscionability alone may support a finding of unconscionability but that procedural unconscionability without any substantive imbalance will rarely render a contract unconscionable.").

222 There have been a few exceptions to this general proposition. *See* Am. Food Mgmt., Inc. v. Henson, 434 N.E.2d 59, 63 (Ill. App. Ct. 1982). In that case, the court invalidated a covenant on grounds of adhesion. *Id.* The employee had reached an oral agreement with the employer and had commenced work for the employer after physically relocating. *Id.* at 60. Only after relocating did the employee receive a written contract from the employer containing a covenant not to compete. *Id.* The employer had failed to advise the employee before he relocated that agreeing to the covenant would be a condition of continued employment. *Id.* at 61. The court found the covenant to be adhesive and unenforceable by reason of the defense of unconscionability. *Id.* at 63; *cf.* Midwest Television, Inc. v. Oloffson, 699 N.E.2d 230, 236 (Ill. App. Ct. 1998) (declining to invalidate contract of adhesion where no evidence of overreaching by the plaintiff was found); Wyatt v. Dishong, 469 N.E.2d 608 (Ill. App. Ct. 1984) (finding no procedural unconscionability because employee new of the covenant's existence before signing).

b. Duress

Another affirmative defense that is available to avoid enforcement of a contract based on alleged inequality of bargaining power is duress or coercion. The defense of duress[223] relates directly to the basic contract element of mutual assent.[224] The idea behind the doctrine of duress is that if an individual acts under some sort of compulsion then his or her actions are not effective to manifest the assent required under contract law. Courts recognize the defense of duress and many have adopted or relied upon the formulation of the doctrine articulated in the Second Restatement of Contracts.[225] Under this doctrine, a contract is voidable for duress "[i]f a party's manifestation of assent is induced by an improper threat by the other party that leaves the victim no reasonable alternative" but to agree to the contract terms.[226]

The threshold element of this duress analysis is whether or not one party made an improper threat.[227] Generally, a threat is anything that mani-

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223 Economists generally have a more limited view of duress than lawyers. Economists believe that duress should be limited in definition to "promise[s] extracted by a threat to destroy." COOTER & ULEN, *supra* note 113, at 237. Economists distinguish between threats that attempt to extract promises that create value and threats which extract promises that destroy value. For example, the threat to walk away from a deal may induce the party to sign, and this might be perceived as duress from a legal standpoint if the threat is from a large corporation and the recipient of the threat is a disempowered individual. From an economics point of view, the contract, if entered into, should be enforced. "Many contracts . . . are offered on a take-it-or-leave-it basis." POSNER, *supra* note 121, at 114. In contrast, a thief's threat to kill a homeowner unless she signs over her house would destroy value, insofar as she is conveying value to the thief absent value-creating exchange. Even if the thief offers to exchange a yo-yo for the house, value is destroyed insofar as the homeowner prefers the house to the yo-yo and the thief lacks insufficient funds to entice the homeowner to sell. *Id.* at 101.

224 *See* RESTATEMENT (SECOND) OF CONTRACTS § 174 cmt. a (1979) (discussing rationale for duress rule and stating that "a party's conduct is not effective as a manifestation of his assent if he does not intend to engage in it."); *see also* E. ALLAN FARNSWORTH, FARNSWORTH ON CONTRACTS § 4.16, at 257 (1990) (stating that "[u]nder general principles of contract law relating to assent, if a victim acts under physical compulsion, for instance, if he signs a writing under such force that he is 'a mere mechanical instrument,' his actions are not effective to manifest his assent.").

225 *See, e.g.*, Derek Sarafa, *Sign! Or Else: Threats, Economics Duress, and the Voidability of Contracts*, 76 MICH. B.J. 1084 (1997) (noting that Michigan has adopted the Restatement position with respect to duress); State Bank of S. Utah v. Troy Hygro Sys., Inc., 894 P.2d 1270, 1274 (Utah Ct. App. 1995) ("Utah has adopted the legal standards of duress set forth in sections 174 through 176 of the Restatement (Second) of Contracts."); Mach. Hauling, Inc. v. Steel of W.V., 384 S.E.2d 139 (W. Va. 1989); Vail/Arrowhead, Inc. v. Dist. Ct., 954 P.2d 608 (Colo. 1998); U.S. *ex rel.* Trane Co. v. Bond, 586 A.2d 734 (Md. 1991).

226 *See State Bank*, 894 P.2d at 1274 (quoting RESTATEMENT (SECOND) OF CONTRACTS § 175(1) (1979)); *see also* FARNSWORTH, *supra* note 224, at 257 (stating the four elements of duress as: "First, there must be a threat. Second, the threat must be improper. Third, the threat must induce the victim's manifestation of assent. Fourth, it must be sufficiently grave to justify the victim's assent.").

227 *See* RESTATEMENT (SECOND) OF CONTRACTS § 176 cmt. a (1979) ("A threat does not amount

fests an intention by one party to inflict harm or loss on the other party, but not all threats lead to duress.[228] Almost all negotiation includes threats of some kind or the other, and thus the duress doctrine specifically requires that the threat be improper.[229] Whether or not a threat is improper largely depends on the circumstances of the case,[230] however there are some general guidelines. Some threats are by their nature so improper that any time they are made the courts will usually find duress to have occurred. The most obvious improper threat is that of physical harm.[231] Other common improper threats include threats which if carried out would constitute criminal or tortious conduct, such as threats of criminal prosecution, and bad faith threats to institute civil proceedings.[232] Other threats are only improper if they lead to additional unfair results,[233] and courts will not apply the duress doctrine to these types of threats unless some unfair result is also shown.[234] Such threats generally include anything that would unduly harm the recipient and does not significantly benefit the threatening party, or anything that is used for illegitimate ends.[235]

Once it has been determined that a party made an improper threat during the bargaining process, the next question is whether the threat actually induced the victim to assent to the terms of the agreement, and whether it was of such a nature as to deny the victim any reasonable choice of acceptance.[236] Again, whether or not a threat justifiably leads the individual to

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to duress unless it is so improper as to amount to an abuse of [the contracting] process.").

228 *See* FARNSWORTH, *supra* note 224, at 257-58 (stating that "[a] threat is a manifestation of an intent to inflict some loss or harm on another," but that "not all such threats are improper for, as we have seen, an offer may be regarded as such a threat.").

229 *See* § 176 cmt. a (stating that "[a]n ordinary offer to make a contract commonly involves an implied threat by one party, the offeror, not to make the contract unless his terms are accepted by the other party, the offeree. Such treats are an accepted part of the bargaining process. A threat does not amount to duress unless it is so improper as to amount to an abuse of that process.").

230 Fox v. Piercey, 227 P.2d 763, 765 (Utah 1951) (citing the Restatement of Contracts).

> The same threats may cause fear in one person and not in another. The test of what act or threat produces the required degree of fear is not objective. The threat need not be such as would put a brave man, or even a man of ordinary firmness, in fear. The question is rather, did it put one entering into the transaction in such fear as to preclude the exercise by him of free will and judgment.

Id.

231 *See* RESTATEMENT (SECOND) OF CONTRACTS § 174 (1979) (stating that "[i]f conduct that appears to be a manifestation of assent by a party who does not intend to engage in that conduct is physically compelled by duress the conduct is not effective as a manifestation of assent.").

232 RESTATEMENT (SECOND) OF CONTRACTS § 176(1) and cmt. a (1979).

233 *Id.* § 176(2) and cmt. a (listing some common threats that must also include elements of unfairness under the circumstances).

234 *Id.* § 176 cmt. a (stating that the types of threats discussed in subsection 2 are not improper "if it can be shown that the exchange is one on fair terms.").

235 *Id.* § 176(2).

236 *See* FARNSWORTH, *supra* note 224, at 257 (listing the elements of the common duress claim).

assent against that person's will depends on the circumstances of the given case.[237] Threats that would justifiably induce assent by one person under one set of circumstances may not justifiably induce assent by another person under a different set of circumstances.[238] As a general rule, a threat reasonably induces duress if it *deprives the particular victim of his or her free will.*[239] Does a threat actually "deprive" or "preclude" a person's free will . . . or does it perhaps "supersede," "override," or "negate" a person's free will?

In addition to the basic doctrine of duress, many states have recognized the related defense of "economic duress."[240] Economic duress employs the same basic elements of common law duress, but requires a very specific type and gravity of threat. Generally, economic duress exists where one party threatens to impose severe economic or financial pressure on the victim in order to induce him or her to agree to a new contract or modification of existing contract terms. For example, one court held that "[t]he existence of economic duress is demonstrated by proof that one party to a contract has threatened to breach the agreement by withholding performance unless the other party agrees to some further demand," thus causing economic harm or loss.[241] Claims of economic duress are those in which the threat alone is unlikely to be sufficient, and where the fairness of the bargain will often be a critical factor. Essentially, a claim of economic duress requires a showing of an improper threat of economic harm that precludes the victim's exercise of free will.[242]

A claim of duress, especially economic duress, might be available to a party seeking to avoid enforcement of a covenant not to compete. For instance, imagine the common scenario where the employee already has a job with the employer, but the employment contract does not currently include post-employment restrictions. Then the employer approaches the employee

237 *See supra* note 230 and accompanying text.

238 *Id.*

239 *See, e.g.*, FDIC v. Linn, 671 F. Supp. 547, 556 (N.D. Ill. 1987).

> Economic duress is present where one is induced by a wrongful act of another to make a contract [or otherwise act] under circumstances which deprive him of the exercise of free will, and a contract executed under duress is voidable. . . . To establish duress, one must demonstrate that the threat has left the individual bereft of the quality of mind essential to the making of a contract.

Id. (quoting Alexander v. Standard Oil Co., 423 N.E.2d 578, 582 (Ill. App. Ct. 1981)).

240 *See* RESTATEMENT (SECOND) OF CONTRACTS § 176 cmt. a (1981) (noting that "[t]he rules stated in this Section recognizes as improper both the older categories and their modern extensions under developing notions of 'economic duress' or 'business compulsion.'"); State Bank of S. Utah v. Troy Hygro Sys., Inc., 894 P.2d 1270, 1275 (Utah 1995) (recognizing claim of economic duress in Utah and adopting the Restatement provisions on duress).

241 *See* Reagan v. Bankers Trust Co., 863 F. Supp. 1511, 1515 (D. Utah 1994) (quoting 805 Third Ave. Co. v. M.W. Realty Assoc., 448 N.E.2d 445 (N.Y. 1983)).

242 *Id.* ("Economic duress requires a 'showing of a wrongful threat which precluded the plaintiff's exercise of free will . . . .'") (citing Grubel v. Union Mut. Life Ins. Co., 387 N.Y.S.2d 442, 443 (1976)).

and informs that employee that in order to retain the job he or she must agree to a modification of the existing employment term and sign a covenant not to compete. The employee is faced with the difficult decision of either losing employment or agreeing to the covenant. The employee signs the covenant, and after termination, seeks to invalidate it based on economic duress.

Similar to a claim of unconscionability, the employee in this scenario would challenge enforcement of the covenant by claiming that the employee only signed the covenant because the employee needed the job, and that the employer induced assent to the post-employment restriction by improperly threatening to terminate the exiting relationship, thus refusing performance on the existing employment contract. The employee would assert that she could not afford to lose her job, that she invested substantial amounts of time and training into the existing position, and that termination would place her in a dire financial state. Such an argument might include claims that the labor market at the time the agreement was made was extremely saturated, or that the employee's skills were so specific to the particular company or area of work that she would not be able to find an equivalent job elsewhere without considerable difficulty. The employee might also claim that she would face a serious decline in economic position if she left the company at the time, and that the threat of losing the job essentially precluded her from exercising her free will, leaving her no choice but to assent to the modification of the employment contract.

While the employee makes some compelling arguments, application of the duress doctrine to such cases seems problematic for a number of reasons. First, the threat of termination from employment does not fit within the category of threats that are so inherently unfair as to be improper per se.[243] Thus, the courts must also consider the fairness of the bargain as a

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[243] *See, e.g.*, Allied Bruce Terminix Co., Inc. v. Guillory, 649 So. 2d 652, 653 (La. Ct. App. 1994) (holding threat of engaging in lawful act does not constitute duress under Louisiana law); Litig. Reprographics & Support Servs., Inc. v. Scott, 599 So. 2d 922, 923-24 (La. Ct. App. 1992) (same); Maust v. Bank One of Columbus, N.A., 614 N.E.2d 765, 768 (Ohio Ct. App. 1992) (holding that threat of engaging in lawful act does not constitute duress under Ohio law); Way Road Dev. Co. v. Snavely, No. 89C-DE-48, 1992 WL 19969, at *4 (Del. Super. Ct. Jan. 31, 1992) (same; applying Delaware law); Alexander v. Standard Oil Co., 423 N.E.2d 578, 582 (Ill. App. Ct. 1981) (holding that "the defense of duress cannot be predicated upon a demand which is lawful or upon doing or threatening to do that which a party has a legal right to do."); *cf.* Simko, Inc. v. Graymar Co., 464 A.2d 1104, 1108 (Md. Ct. Spec. App. 1983) ("[U]nder appropriate circumstances the threat of discharge to induce an employee to sign a restrictive covenant may constitute duress."). This Restatement example is widely used to suggest that threat of discharge constitutes duress:

> A makes a threat to discharge B, his employee, unless B releases a claim that he has against A. The employment agreement is terminable at the will of either party, so that the discharge would not be a breach by A. B, having no reasonable alternative, releases the claim. A's threat is a breach of his duty of good faith and fair dealing, and the release is voidable by B.

RESTATEMENT (SECOND) OF CONTRACTS § 176 cmt. e, illus. 11 (1981). However, this illustration whole, and it seems likely that the court will find the bargain as a whole to be essentially fair. Courts have commonly held that continued employment is valid consideration for a contract,[244] and since covenants not to compete also frequently include an increased wage,[245] it is likely that the court will find that the employee got a fair shake. Second, the courts have made it clear that the mere existence of financial pressure and unequal bargaining position are insufficient to sustain claims of duress, especially economic duress.[246] Thus, an assertion that refusing to sign the covenant, and thus losing the job, alone would cause the employee financial strain probably does not suffice to sustain a claim of duress. Third, while the threat of termination is obviously burdensome to the employee, just because something causes a burden on the other party does not mean that it rises to the level of an improper threat, and it is unlikely that such a threat actually deprives the employee of reasonable choices such that his or her free will is precluded. While it may be difficult to secure new and equivalent employment, it is not impossible. It seems that an argument for lack of reasonable choice would only succeed in extremely specialized fields, where work is extraordinarily limited and employment is difficult to find—for example, high-technology industries.[247] Fourth, claims of economic duress generally re-

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applies where there is a contract between A and B, and does not apply when there is employment at-will. *See* DeJean v. United Airlines, Inc., 839 P.2d 1153, 1160 (Colo. 1992) (noting illustration above concerns threat to breach a contract).

244 *See, e.g.*, Medtronic, Inc. v. Benda, 689 F.2d 645, 654 (7th Cir. 1982) (applying Illinois law), *cert. denied*, 459 U.S. 1106 (1983); Dickinson v. Auto Center Mfg. Co., 639 F.2d 250, 253 (5th Cir. 1981) (per curiam) (applying Florida law); Olin Water Servs. v. Midland Res. Labs., Inc., 596 F. Supp. 412, 415 (E.D. Ark. 1984) (applying Arkansas and Kansas law), *appeal dismissed*, 774 F.2d 303 (8th Cir. 1985); Barnes Group, Inc. v. O'Brien, 591 F. Supp. 454, 461 (N.D. Ind. 1984) (applying Ohio law); Daughtry v. Capital Gas Co., 229 So. 2d 480, 483 (Ala. 1969); Wright & Seaton, Inc. v. Prescott, 420 So. 2d 623, 628 (Fla. Dist. Ct. App. 1982); McQuown v. Lakeland Window Cleaning Co., 136 So. 2d 370, 371-72 (Fla. Dist. Ct. App. 1962); Tasty Box Lunch Co. v. Kennedy, 121 So. 2d 52, 54 (Fla. Dist. Ct. App. 1960); Farm Bureau Serv. v. Kohls, 203 N.W.2d 209, 212 (Iowa 1972); Simko, Inc. v. Graymar Co., 464 A.2d 1104, 1107-08 (Md. Ct. Spec. App. 1983); Reed, Roberts Assocs. v. Bailenson, 537 S.W.2d 238, 241 (Mo. Ct. App. 1976); Smith, Batchelder & Rugg v. Foster, 406 A.2d 1310, 1312 (N.H. 1979); Hogan v. Bergen Brunswig Corp., 378 A.2d 1164, 1167 (N.J. Super. Ct. App. Div. 1977) (per curiam); Matlock v. Data Processing Sec., Inc., 607 S.W.2d 946, 948 (Tex. App. 1980), *modified*, 618 S.W.2d 327 (Tex. 1981); *see generally* Yates, *supra* note 211.

245 *See, e.g.*, Ferdinand S. Tinio, Annotation, *Sufficiency of Consideration for Employee's Covenant Not to Compete, Entered Into After Inception of Employment*, 51 A.L.R.3d 825 (2003) (noting that increased wages are typically held to be valid consideration for covenants not to compete entered into after employment commences).

246 *See* Berube v. Fashion Centre, Ltd., 771 P.2d 1033, 1040 (Utah 1989) (holding that "economic necessity alone is insufficient" to invalidate a contract under a duress theory); Reagan v. Bankers Trust Co., 863 F. Supp. 1511, 1515 (D. Utah 1994) (stating that "the existence of financial pressure and an unequal bargaining position are insufficient to constitute economic duress. . . .").

247 Also, in these fields the employer is likely to face similar difficulty in finding suitable replace-

quire a showing that the employer threatened to refuse performance on an existing contract or duty.[248] In states which follow the employment-at-will doctrine allowing termination at any time, for any reason, the question arises whether the employer has any pre-existing obligation to the employee, and thus whether there is any actual threat to deny performance on a pre-existing obligation.[249]

Another reason that the arguments of duress or unconscionability are apt to fail is that such arguments are actually expressions by employees that they lack power in the labor market.[250] Lack of market power in relation to the employer can be the result of either an excessive supply of labor or an inadequate demand for labor.[251] Demand for labor derives from the demand for the employer's product in the goods market.[252] The more goods demanded, the more the employer will demand labor.

Where the inequality of bargaining power arises solely as a result of market conditions, application of the unconscionability or duress doctrines is difficult to justify. It is not a situation where one party purposely takes or threatens to take advantage of the other's weaker position. Rather, it is a situation where both parties adapt their relationship to meet the market conditions, and there are two reasons why the case for invoking the unconscionability or duress doctrines is weak in such cases. First, when employee bargaining position is weak because of market conditions, if the employer

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ments and would probably avoid making such a demand if possible.

248 *Reagan*, 863 F. Supp. at 1515 (holding that "[t]he existence of economic duress is demonstrated on proof that one party to a contract has threatened to breach the agreement by withholding performance unless the other party agrees to some further demand.").

249 *See* Litig. Reprographics & Support Servs. v. Scott, 599 So. 2d 922, 923 (La. Ct. App. 1992).

> To establish duress, defendants must show more than merely that their continued employment was conditioned upon their signing of the non-competition agreements. Defendants were "at will" employees, who could be terminated by LRSS at any time for any reason. Therefore LRSS's threat to terminate them, which it had a legal right to do, did not constitute duress.

Id.

250 Clark v. Liberty Nat'l Life Ins. Co., 592 So. 2d 564, 567 (Ala. 1992) (denying defense of duress where pressure to sign came from economic necessity). The *Clark* court noted that:

> [e]conomic duress consists of: "(1) wrongful acts or threats; (2) financial distress caused by the wrongful acts or threats; [and] (3) the absence of any reasonable alternative to the terms presented by the wrongdoer." The doctrine of economic duress applies only to "special, unusual, or extraordinary situations in which unjustified coercion is used to induce a contract, as where extortive measures are employed, or improper or unjustified demands are made, under such circumstances that the victim has little choice but to accede thereto. The entering into a contract with reluctance or even dissatisfaction with its terms because of economic necessity does not, of itself, constitute economic duress invalidating the contract. Unless unlawful or unconscionable pressure is applied by the other party to induce the entering into a contract, there is not economic compulsion amounting to duress."

Id. (quoting Int'l Paper Co. v. Whilden, 469 So.2d 560, 562 (Ala. 1985)) (internal citations omitted).

251 *See generally* Thomas J. Campbell, *Labor Law and Economics*, 38 STAN. L. REV. 991 (1986).

252 *Id.*

were forced to forgo the covenant not to compete it would simply reduce the employee's wage and leave the non-wage terms unchanged. In other words, absent a post-employment restraint, the employee would simply obtain an even lower money wage. In this respect the post-employment restraint remains paid for, but at a more direct cost to the employee. The employee trades off a higher money wage for a post-employment restraint, without equalizing his bargaining position at all. Secondly, when demand for labor grows it would be improper for the employer to impose a post-employment restraint into a pre-existing employment contract. Accordingly, both the unconscionability and duress arguments appear to run only one way.

5. Post-Employment Restraints under Externalities

Another deviation from the ideal case is when a post-employment restraint—while undertaken under conditions of perfect information by both parties—has an undesirable effect on third parties of such magnitude that it derogates public policy goals such as maintenance of competitive markets, or prevention of significant harm to consumers.

a. Restraints of Trade

Courts assume that all post-employment restraints have a potential impact on competition, so courts universally apply the reasonableness test.

As described above, it is not always the case that post-employment restraints affect consumers. As our economy becomes more and more technologically based, however, post-employment restraints are more likely to affect consumer as they impact competition. Innovation is perhaps the competitive motivator for technologically based economies, and restraints on the mobility of the innovators may stifle innovation and therefore competition.

The state court test for reasonableness often confuses impact on competition with impact on the employee. The typical reasonableness test weighs the "legitimate" employer interest seeking to be protected against the employee's interest.[253] The issue in a restraint of trade analysis, however, is not the employee's interest, but the impact on consumers.

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253 *See supra* Part I.B.

b. Federal Court and Antitrust Agency Analysis

Suppose that an employer and employee enter into a post-employment restraint with full information and equal bargaining power. The restraint raises prices to consumers, but the states' reasonableness test would only indirectly take account of this critical effect. A better approach is the analysis adopted by the federal courts in analyzing covenants not to compete.

Under the federal courts approach, the first step in the analysis is to define the *relevant market* in which the restraint might have effect.[254] Such a market analysis is a screening device that filters out claims that will only remotely impact a legitimate interest of the employer or adversely affect consumers. In other words by confining the relevant effects to the relevant market, the court can discern the relative magnitudes of the effects they are comparing.

Over the course of a century, the federal courts have developed a jurisprudence of market analysis, including cases analyzing covenants not to compete.[255] Nevertheless, the Supreme Court has produced a disjointed body of law on markets.[256] Over time, courts have adopted the principles for defining the relevant market set forth in the Horizontal Merger Guidelines (Merger Guidelines) promulgated by the Department of Justice and Federal Trade Commission (FTC).[257]

The Merger Guidelines represent an attempt to bring merger analysis under section 7 of the Clayton Act more into line with modern economic thinking. For the most part, economists employed at the antitrust enforcement agencies authored the Merger Guidelines.

The stated purpose of the Merger Guidelines is to identify economic dangers posed by mergers that may "create or enhance 'market power' or ... facilitate its exercise."[258] "Market power" is defined as the ability to

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254 *See, e.g.*, Dunafon v. Del. McDonald's Corp., 691 F. Supp. 1232, 1241-42 (W.D. Mo. 1988).

255 *See infra* Part II.B.5.d.

256 For a detailed discussion of the Supreme Court's disjointed analysis, see Mark A. Glick et al., *Importing the Merger Guidelines Market Test in Section 2 Cases: Potential Benefits and Limitations*, 42 ANTITRUST BULL. 121 (1997).

257 U.S. DEPARTMENT OF JUSTICE & FEDERAL TRADE COMMISSION, HORIZONTAL MERGER GUIDELINES (1997), *reprinted in* JOHN J. FLYNN, HARRY FIRST AND DARREN BUSH, ANTITRUST: STATUTES, TREATIES, REGULATIONS GUIDELINES AND POLICIES 256 (2001) [hereinafter MERGER GUIDELINES]; *see, e.g.*, AntiMonopoly, Inc. v. Hasbro, Inc., 958 F. Supp. 895, 902, 905 (S.D.N.Y. 1997) (applying Merger Guidelines to monopolization and Robinson-Patman case); Del. Health Care Inc. v. MCD Holding Co., 957 F. Supp. 535, 541-542 (D. Del. 1997) (commenting on economist's Merger Guideline's approach to a monopoly leveraging case); Todd v. Exxon Corp., 275 F.3d 191, 208 (2d Cir. 2001) (commenting on district court's application of Merger Guidelines to show the unlikelihood of collusion in an industry with a low concentration level).

258 *See* MERGER GUIDELINES, *supra* note 257, at § 0.1.

profitably raise price above competitive levels.[259] That "market power" could result from either an increased unilateral ability to raise price or from an industry structure more conducive to collusive activities. Market power is constrained by the ability of customers to substitute away from a price increase by buying different products or the same products from more distant suppliers (demand substitution) or by buying from additional sellers attracted by the increased price (supply substitution). The Merger Guidelines set out an integrated multistep procedure designed to analyze these issues.

As the first step in the analytical process designed to determine when market power may be created or enhanced by a proposed merger, the Merger Guidelines call for defining the *relevant markets*. The FTC is concerned about relevant markets because by ensuring that merging firms do not dominate similar relevant markets, the FTC discourages monopolization. According to the Merger Guidelines, a market:

> is defined as a product or group of products and a geographic area in which it is sold such that a hypothetical, profit-maximizing firm, not subject to price regulations, that was the only present and future seller of those products in that area would impose a small but significant and nontransitory increase in price above prevailing or likely future levels.[260]

That is, the relevant market has both a geographic and a product component. If, in a given geographical area, a sole provider of a particular product could profitably raise its price a "small but significant" amount (e.g., five percent), then that product is a relevant market for that geographical area.

The procedure set forth in the Merger Guidelines is as follows: Starting with a particular product of one of the merging firms, the analyst asks whether a hypothetical monopolist would find it profitable to increase prices of that product above the competitive levels[261] by approximately five

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259 *Id.* § 0.1.

260 *Id.* § 2.0.

261 While the Merger Guidelines are designed for the examination of horizontal mergers, they have been applied in monopolization cases to determine the relevant market. *See, e.g.*, United States v. Visa U.S.A., Inc., 163 F. Supp. 2d 322, 336 (S.D.N.Y. 2001). One difficulty, however, in applying the Merger Guidelines to monopolization cases is that mergers are examined with an eye towards whether the merger or acquisition will create monopoly power after the transaction is consummated. In the monopolization context, in contrast, current behavior is analyzed. The distinction is important in the context of defining the relevant market, as consumers may switch to other products or services if a monopolist raises prices above current levels. However, a monopolist would never do so because such a price increase would not be profitable. Under competitive prices, these products would never be considered substitutes by consumers.

This false notion that the existence of substitutes means that no market power exists has been dubbed the Cellophane Fallacy based on the case of United States v. E.I. du Pont de Nemours & Co., 351 U.S. 377 (1956), which calculated the relevant market's size, "as defined by the number and availpercent. If the answer is yes, then the analyst deems the product to be a relevant market for further consideration, and the analyst moves on to the next product.[262] If the answer is no, the product, in and of itself, is deemed too narrow to constitute a relevant market, and the set of products is broadened to include the next best set of substitutes and the process is repeated. The analyst inquires whether a sole provider of both the product and the next best set of substitutes could profitably increase price by five percent. If yes, that set of products is deemed a relevant market. If no, the next best set of substitutes is again added and the process is repeated.[263] Thus, a relevant product market is the *smallest* set of products for which a hypothetical monopolist would find it profitable to increase prices by five percent. The analysis continues until markets are delineated around each of the products of each of the merging firms. The two sets of product markets are then compared to determine whether the two merging firms are participants in any of the same product markets. If they are, the merger is deemed "horizontal" and analysis of any potential anticompetitive effects resulting from the merger continues.

Geographic markets are defined in an analogous manner. Beginning with the location of each merging firm, the analyst asks whether a sole provider of the relevant product could raise its price by five percent. If not, the geographic area is expanded to include the next best substitute for production and the analysis is repeated.[264] This process continues until the test is satisfied. For any given merger, there can be multiple relevant product and geographical markets, each addressing a different possible exercise of market power.

The Merger Guidelines' mechanism for dealing with potential supply-side responses to an exercise of market power is also noteworthy. In defining the relevant product market, the Merger Guidelines focus directly on demand-side substitution—the reaction of the consumer to an increase in price. Supply-side substitution responses to attempted exercises of market power—supplier reactions to price increases—are considered in separate sections of the Merger Guidelines dealing with the identification of firms in

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ability of substitutes, with reference to supra-competitive (monopoly) price rather than the lower competition price. As a result, the Court held that the defendant [cellophane producer] had no market power when it in fact had substantial market power." Gene C. Schaerr, Note, *The Cellophane Fallacy and the Justice Department's Guidelines for Horizontal Mergers*, 94 YALE L.J. 670, 676-77 (1985) (comparing the Cellophane Fallacy to the Department of Justice's Merger Guidelines); *see* Donald F. Turner, ANTITRUST POLICY AND THE CELLOPHANE CASE, 70 HARV. L. REV. 281, 308-13 (1956) (pointing out the Supreme Court's fallacious reasoning in this seminal work on the subject).

262 MERGER GUIDELINES, *supra* note 257, at § 1.11.

263 *Id.* § 1.11.

264 *See id.* § 1.21.

the relevant market and likelihood of new entry.[265] This is accomplished by including among the participants in the defined market not only those firms presently producing products in the relevant market, but also those firms that are "uncommitted entrants."[266] Uncommitted entrants are firms that, in response to a five percent price increase and without the expenditure of significant sunk costs, would likely supply the relevant product within one year. The likelihood, timeliness, and sufficiency of longer-term supply responses (i.e., within two years) are addressed in the entry analysis section of the Merger Guidelines.[267] This longer-term supply response is also considered because, as recognized in the Merger Guidelines:

> A merger is not likely to create or enhance market power or to facilitate its exercise, if entry into the marketplace is so easy that market participants, after the merger, either collectively or unilaterally could not profitably maintain a price increase above premerger levels. Such entry likely will deter an anticompetitive merger in its incipiency, or deter or counteract the competitive effects of concern.[268]

Once the firms that participate in the relevant markets have been identified, each firm's market share is calculated. Market shares are typically calculated as each firm's share of total sales or current capacity in the market. These market shares are then used to calculate the Herfindal-Hirschman index of market concentration (HHIs) for the postmerger market and the change in concentration resulting from the merger. The Merger Guidelines consider postmerger HHIs of 1800 to represent highly concentrated markets.[269] Mergers in such markets that increase the HHI by more than 100 points are rebuttably presumed to create market power.[270]

c. An Application to Innovation Markets

The concept of an innovation market is particularly applicable to post-employment restraints. Innovation is particularly critical to consumer welfare and economic growth. Recognizing the importance of innovation the Department of Justice and the Federal Trade Commission have developed the concept of an "innovation market."[271] Although the idea of innovation markets has been introduced into the judicial context, the best articulation

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265 *Id.* §§ 1.3, 3.0.
266 *Id.* § 1.32.
267 *Id.* § 3.0.
268 *Id.* § 3.0.
269 *Id.* § 1.51.
270 *See id.* § 1.51.
271 Congress created the innovation market concept when it enacted the National Cooperative Research and Production Act, 15 U.S.C. §§ 4301-5 (1997).

can be found in the Department of Justice and Federal Trade Commission Intellectual Property Guidelines (the "Intellectual Property Guidelines"), issued in April 1995.[272] As defined by the Intellectual Property Guidelines, an innovation market "consists of the research and development directed to particular new or improved goods or processes, and the close substitutes for that research and development."[273] In other words, a market in research and development activities can be defined separately from the goods and services actually produced by those activities. Accordingly, a merger between two firms that do not compete in a goods market, but compete in research and development activities, may have anticompetitive effects on innovation.

The concept of an innovation market has been so far almost exclusively applied in the merger context. In this application the innovation market concept has been severely criticized.[274] One reason for this criticism is that Section 7 of the Clayton Act refers to "line of commerce" and the relationship between innovation and commerce is tenuous at best.[275]

Innovation markets may have particular application in post-employment restraint cases. This is because in an innovation market there are no final-goods prices or output. Anticompetitive effects there occur by restricting inputs. This is precisely what post-employment restraints do—they restrict inputs. In the world of high-tech industry, post-employment restraints may act to limit access to human talent by competitors. The innovation market concept allows one to conceptualize in a standard fashion this potential harm.

d. Federal Cases Addressing Covenants Not To Compete

It was really not until the 1950s and 1960s that the federal courts began analyzing covenants not to compete under the Sherman Act.[276] These

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272 U.S. DEPARTMENT OF JUSTICE & FEDERAL TRADE COMMISSION, ANTITRUST GUIDELINES FOR THE LICENSING OF INTELLECTUAL PROPERTY (1995), *reprinted in* 4 Trade Reg. Rep. (CCH) ¶ 13,332.

273 *See* MERGER GUIDELINES, *supra* note 257, at § 3.2.2.

274 *See, e.g.*, George A. Hay, *Innovations in Antitrust Enforcement*, 64 ANTITRUST L.J. 7 (1995); Richard T. Rapp, *The Misapplication of the Innovation Market Approach to Merger Analysis*, 64 ANTITRUST L.J. 19 (1995); Robert J. Hoerner, *Innovation Markets: New Wine in Old Bottles?*, 64 ANTITRUST L.J. 49 (1995).

275 *See* Hoerner, *supra* note 274, at 50.

276 *See, e.g.*, Compton v. Metal Prods., Inc., 453 F.2d 38 (4th Cir. 1971) (holding that even if covenant not to compete contained in patent license was deemed a covenant not to compete ancillary to a sale of business it would be invalidated because of its unreasonable scope and duration); Snap-on Tools Corp. v. FTC, 321 F.2d 825 (7th Cir. 1963) (upholding post-termination covenants not to compete contained in plaintiff's exclusive dealer contracts); Tri-Cont'l Fin. Corp. v. Tropical Mar. Enters., 265 F.2d 619 (5th Cir. 1959) (upholding covenant restricting use of shipping vessel and effectively restricting competition as a reasonable restriction ancillary to a valid sale of real property).

early cases typically did not apply the full rule of reason analysis, but rather disposed of the cases under the more traditional, state-court analysis, looking mainly at the reasonableness of the restrictions imposed, in terms of duration and scope.[277] In the 1970s the federal courts began analyzing covenants not to compete under the full rule of reason analysis. As one court in the early seventies noted, up until this time "a state court, or in a diversity case, a federal court applying state law, provide[d] the usual forum for protecting the employee and whatever interest the public may have. There [was] certainly a total absence of federal Sherman Act experience."[278]

In the beginning, the courts were slow to develop the reasonableness analysis. Although most of the courts recognized that the rule of reason analysis could and should apply to covenants not to compete,[279] the analysis was vague and remained focused on reasonableness in terms of duration, scope, etc., and did not thoroughly address the issue of consumer harm.[280]

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277 *See, e.g.*, *Snap-on Tools*, 321 F.2d at 837 (holding that "[r]estrictive clauses of this kind are legal unless they are unreasonable as to time or geographic scope," and not addressing relevant market questions). While some of these early federal cases sometimes mentioned the existence or non-existence of anticompetitive effect, *see id.* (noting that "neither the commission nor its counsel cite any facts in the record showing any substantial restraint resulting solely from this restrictive clause."), they did not usually address whether such an anticompetitive effect was necessary in holding the covenant invalid. Instead, they moved right to assessing whether the agreement was reasonable on its face. *See generally Compton*, 453 F.2d at 45 (holding that if covenant in patent license agreement were analyzed under the Sherman Act it would be unreasonable in duration and scope, without addressing monopoly power or anticompetitive effect); *Snap-on Tools*, 321 F.2d at 836-37 (upholding covenants not to compete based on reasonableness of duration and scope without addressing competitive effect or monopoly power); *Tri-Cont'l*, 265 F.2d at 625-27 (same).

278 *See* Bradford v. N.Y. Times Co., 501 F.2d 51, 60 (2d Cir. 1974).

279 *See, e.g.*, Transource Int'l v. Trinity Indus., 725 F.2d 274, 279-81 (5th Cir. 1984) (holding that where agreements not to compete are not *per se* illegal they must be analyzed under the rule of reason analysis).

280 For example, in *Alders v. AFA Corp. of Florida*, 353 F. Supp. 654 (S.D. Fla. 1973), the district court noted the applicability of the Sherman Act analysis but did not apply it clearly or fully. The case involved the sale of AFA Corp., a maker of liquid spray devices, to Thiokol Chemical Corp. *See id.* at 655. As part of the sale agreement Alders, the sole owner of AFA Corp. at the time of the sale, agreed not to become in any way affiliated with any company in the United States, Mexico, or Canada, that was "engaged, or [was] actively preparing to engage, in the business of manufacturing and selling liquid spray devices or other products" similar to those of AFA or its subsidiaries for a period of five years. *Id.* at 655-56. After terminating his employment with the company, Alders sought a declaratory judgment rendering the covenant not to compete void. *Id.* at 655. The court upheld the agreement. It first held that the covenant not to compete was not a *per se* violation of the Act. *Id.* at 656-57. It then jumped immediately to the analysis of whether the agreement was reasonable in scope and duration. *See id.* Although it stated in its analysis that "[c]ompetition in this industry is intense and AFA's market share is small," thus recognizing the need to address the covenant's actual anticompetitive effects, it did not conduct a thorough analysis or discuss this required element in detail. *Id.* at 659. Thus, at this point in the federal treatment of covenants not to compete, the facial reasonableness of the agreement was still the predominant factor.

Eventually, however, the full rule of reason analysis emerged as the predominant means of addressing covenants not to compete in the limited federal court treatment.[281] As such, since the mid to late 1970s, the small number of federal courts addressing covenants not to compete, whether as part of a contract for the sale of a business or part of an employment contract, have applied the full rule of reason analysis and have almost uniformly upheld covenants not to compete.[282]

To begin with, all of the courts addressing the issue have held that covenants not to compete ancillary to either the sale of a business, the sale of property, a partnership agreement, or a general employment contract are

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Another example came the next year, in *Bradford v. New York Times Co.*, 501 F.2d 51 (2d Cir. 1974). *Bradford* involved a post-employment covenant not to compete between the general manager, vice-president, and director, Bradford, and the company itself. *Id.* at 54. Bradford had broad and vital corporate responsibilities and was in charge of all business operations including the advertising, circulation, production, and promotion departments, and acquired extensive knowledge of the company's business plans. *Id.* Under the covenant, the company would pay out "bonuses" to retiring employees for ten years provided they did not become associated with competing companies after retirement. *Id.* Bradford retired and participated in the plan. *Id.* Shortly after retirement, Bradford informed the company that he was taking a position with a competitor newspaper, and the company subsequently stopped paying his benefits. *Id.* at 54-55. Bradford challenged the validity of the agreement under New York law and the Sherman Act, and the Court upheld it under both. Regarding the Sherman Act, the court first held that there was no *per se* violation. *Id.* at 59. It then held that the agreement was reasonable. *Id.* at 57-59. Nowhere in the opinion did the court address the impact of the agreement on competition, or the need to find anticompetitive effect. Thus, even though technically applying the Sherman Act analysis, the court did not apply it in its entirety.

281 *See, e.g.*, Sound Ship Bldg. Corp. v. Bethlehem Steel Corp., 387 F. Supp. 252, 255 (D.N.J. 1975) (upholding a covenant not to compete attached to the sale of shipyard). The court held that:

> [a] distillation of *Addyston* and its progeny identify four primary indicia of reasonableness of a restrictive covenant. 1. The restraint is ancillary to the main purpose of a lawful contract. 2. The restraint is neither imposed by a party with monopolistic power nor fosters a monopoly. 3. The restraint is partial in nature and reasonably limited in time and scope. 4. The restraint is no greater than necessary to afford fair protection to the parties and not so extensive as to interfere with the interests of the public.

Id.

282 *See generally* Polk Bros. v. Forest City Enters., 776 F.2d 185 (7th Cir. 1985) (applying traditional rule of reason analysis and upholding covenant not to compete in building lease and purchase agreements between large appliance dealer and building supplies dealer sharing the same building); Aydin Corp. v. Loral Corp., 718 F.2d 897 (9th Cir. 1983) (upholding post-employment covenant not to compete entered into at termination of employment finding that no anti-competitive effect of agreement was shown); *Sound Ship*, 387 F. Supp. at 252 (upholding covenant ancillary to sale of harbor front property that forbid certain ship building and repair activity finding that covenant was reasonable under rule of reason test); Newburger, Loeb & Co. v. Gross, 563 F.2d 1057 (2d Cir. 1977) (upholding covenant not to compete contained in brokerage firm's partnership agreement holding that agreement had legitimate purpose and was reasonable and not overbroad); United States v. Empire Gas Corp., 537 F.2d 296 (8th Cir. 1976) (upholding numerous covenants not to compete in gas company's employment contracts against Government's claims of illegality holding that there was no indication of attempts or success in monopolizing the liquid petroleum gas market and that the covenants were reasonable and served legitimate purposes).

not illegal per se under the Sherman Act and must be subjected to the rule of reason test.[283] Under federal Sherman Act law, "per se rules are appropriate only for 'conduct that is manifestly anticompetitive, ... that is, conduct that would always or almost always tend to restrict competition.'"[284] Generally, restraints are only invalid per se if they are those "which because of their pernicious effect on competition and lack of any redeeming virtue are conclusively presumed to be unreasonable and therefore illegal without elaborate inquiry as to the precise harm they have caused or the business excuse for their use."[285] Examples of such per se restraints are vertical price restraints, horizontal restraints, and group boycotts.[286] In determining whether or not a restraint is illegal per se, the courts also consider whether it is a "naked" restraint of trade—a contract with no purpose other than hindering competition in some way—or whether it is an "ancillary" restraint of trade—one that is part of an agreement with legitimate business purposes other than restraint of competition.[287] Further, the federal courts have consistently held that ancillary covenants not to compete, including post-employment covenants that are part of general employment contracts, are never invalid per se.[288] Thus, federal courts generally agree that covenants not to compete must be analyzed under the rule of reason analysis.[289]

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283 *See, e.g.*, Dunafon v. Del. McDonald's Corp., 691 F. Supp. 1232, 1241 (W.D. Mo. 1988) (stating that "[t]his court agrees with the consensus of other federal courts that the varying terms, conditions, and economic justifications for restrictive covenants in shopping center leases should more properly be examined under the rule of reason," and that "[t]his approach is consistent with the rule that ancillary restraints should be evaluated under the rule of reason."); *Polk Bros.*, 776 F.2d at 189 (noting that post-employment covenants not to compete are evaluated under the rule of reason and are not *per se* invalid); Lektro-Vend Corp. v. Vendo Co., 660 F.2d 255, 265 (7th Cir. 1981) (holding that "[u]nless the challenged activity conforms to one of the few categories of restraints adjudged to be per se illegal, its legality is properly tested under the rule of reason analysis," and that "non-competition covenants ancillary to a legitimate transaction must be analyzed under the rule of reason.").

284 Bus. Elecs Corp. v. Sharp Elecs. Corp., 485 U.S. 717, 721 (1988) (internal quotations omitted).

285 *Dunafon*, 691 F. Supp. at 1241 (W.D. Mo. 1988) (internal citation omitted).

286 *See* Bradford v. N.Y. Times Co., 501 F.2d 51, 60 (2d Cir. 1974) (noting that "the litany of *per se* restraints . . . includes horizontal price-fixing or division of markets, group boycotts and tying provisions," and refusing to apply the per se rule to a covenant not to compete ancillary to an employment contract).

287 *See, e.g.*, *Polk Bros.*, 776 F.2d at 188-89 (holding that "[a] court must distinguish between 'naked' restraints, those in which the restriction on competition is unaccompanied by new production or products, and 'ancillary' restraints, those that are part of a larger endeavor whose success they promote.").

288 *See, e.g.*, *id.* at 189.

> If A hires B as a salesman and passes customer lists to B, then B's reciprocal covenant not to compete with A is "ancillary." At the time A and B strike their bargain, the enterprise . . . expands output and competition by putting B to work. The covenant not to compete means that A may trust B with broader responsibilities, the better to compete against third parties. Covenants of this type are evaluated under the Rule of Reason as ancillary restraints . . . .

Id.; *Lektro-Vend Corp.*, 660 F.2d 255 (holding that "[u]nless the challenged activity conforms to one of the few categories of restraints adjudged to be per se illegal, its legality is properly tested under the rule

After rejecting any arguments of per se invalidity, most federal cases in the area of covenants not to compete address the covenants' effects on competition. In the early cases applying the full rule of reason analysis, courts did not completely analyze the relevant market and make a determination of market power, but simply held that the plaintiff challenging a covenant not to compete under the Sherman Act had the burden to show anticompetitive effect in the market. For instance, in 1983, in *Aydin Corp v. Loral Corp.*,[290] the Ninth Circuit Court of Appeals held that "[t]o establish anticompetitive market effect, the plaintiff must prove that the defendant's actions caused a decrease in competition in the relevant market," and that "[plaintiff] has the burden to plead and prove that the actions of [defendant] harmed competition, not merely that the actions harmed [plaintiff] in its capacity as a competitor."[291] The *Aydin* court refused to find the covenant not to compete invalid because the plaintiff failed to prove any anticompetitive effect.[292]

More modern decisions, however, have made clear the need to define the relevant market and determine market power as part of the overall assessment of anticompetitive effect.[293] A good example comes from the United States District Court for the Western District of Missouri in 1988, in *Dunafon v. Delaware McDonald's Corp.*[294] In *Dunafon*, a McDonald's franchisee leased a free-standing building in a mall parking lot.[295] As part of the lease agreement, the mall agreed not to lease to "any persons [engaged] in a carry-out fast food restaurant in which food and beverages are

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of reason analysis," and that "non-competition covenants ancillary to a legitimate transaction must be analyzed under the rule of reason.").

289 *See, e.g.*, Dunafon v. Del. McDonald's Corp., 691 F. Supp. 1232, 1242 (W.D. Mo. 1988) (citations omitted) (stating that "[t]his Court agrees with the consensus other federal courts that the varying terms, conditions and economic justifications for restrictive covenants in shopping center leases should more properly be examined under the rule of reason," and refusing to apply the per se rule).

290 718 F.2d 897 (9th Cir. 1983).

291 *Id.* at 902.

292 *Id.* at 903 (dismissing plaintiff's claim holding that "a rational trier of fact could not find that [defendants] have caused a decrease in competition in the relevant product or labor market.").

293 *See, e.g.*, Newburger, Loeb & Co. v. Gross, 563 F.2d 1057, 1082-83 (2d Cir. 1977) (noting adverse effects covenants not to compete could potentially have on labor market, stating that "[w]hen a company interferes with free competition for one of its former employee's services, the market's ability to achieve the most economically efficient allocation of labor is impaired," and that "employee non-competition clauses can tie up industry expertise and experience and thereby forestall new entry," but holding that "[i]n certain cases, post-employment restraints do serve legitimate business purposes," and recognizing the need to look at the actual effects of the agreement on competition in assessing its legality under the Sherman Act).

294 691 F. Supp. 1232 (W.D. Mo. 1988).

295 *Id.* at 1235.

dispensed that is in direct competition with lessee...."[296] The dispute arose when a Taco Bell distributor sought a lease for space within the mall, and McDonald's refused the mall's request to waive the covenant.[297] The Taco Bell owner sued alleging violation of the Sherman Act.[298]

In analyzing the case, the district court made a detailed analysis of the relevant market and the McDonald's franchisee's relevant market power.[299] It defined the relevant market to include at least five different shopping centers in the vicinity of the subject mall, and found that at least forty other fast food restaurants conducted business in the area.[300] The court then found that the McDonald's did not have dominant market power in this area.[301] To begin, it found that since the time McDonald's entered into its covenant with the mall a number of new fast food restaurants had opened and were competing successfully in the surrounding area.[302] It also found as evidence of continuing competition that three or four restaurants had opened and closed due to the intense competition in the area, and that there were numerous alternative sites for the Taco Bell to enter and compete in the relevant market.[303] Finally, having defined the relevant market and finding McDonald's to hold only a minimal market share, the court held because the plaintiff failed to prove any actual adverse impact on competition in the relevant market, there was no need to analyze the reasonableness of the restriction and its terms.[304]

When a court finds a covenant not to compete to have an adverse impact on the relevant market, or when the court finds a defendant has sufficient market power to reasonably effect competition through the covenant, the court then analyzes the actual reasonableness of the agreement. Under this part of the test, the covenants must be no "greater than necessary to afford protection to the parties and not so extensive as to interfere with the interests of the public."[305] This analysis would involve two parts. First, the court assesses the reasonableness of the agreement itself in terms of duration and scope. Second, the court assesses whether the agreement somehow negatively impacts the public. Of all the cases analyzed to date, while some

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296 *Id.* at 1236.

297 *Id.*

298 *Id.* at 1235.

299 *Id.* at 1237-39.

300 *Id.* at 1237-38.

301 *Id.* at 1238-39.

302 *Id.* at 1239.

303 *Id.* at 1239-40.

304 *Id.* at 1242 ("The plaintiff has failed to prove that the lease covenant has a substantial adverse effect on competition. Thus, it is unnecessary for the defendant to establish economic justifications for the restriction as an affirmative defense.").

305 Sound Ship Bldg. Corp. v. Bethlehem Steel Corp., 387 F. Supp. 252, 255 (D.N.J. 1975) (citing Schine Chain Theatres v. United States, 334 U.S. 110 (1948)).

courts have invalidated covenants not to compete based on unreasonable scope or duration,[306] no court has invalidated based on unreasonable impact to the public.[307]

To understand how the federal courts apply the Sherman Act analysis to covenant not to compete cases, it is important to understand that the majority of the federal cases on the matter relate to covenants which are ancillary to the sale of a business, the sale of property, or some sort of partnership agreement. There is only a limited number of the type of pure post-employment restraints discussed up to this point. However, there are two cases that address such restraints and exemplify how the federal analysis works in such settings.

In the 1981 case of *Lektro-Vend Corp. v. Vendo Co.*, the Seventh Circuit Court of Appeals upheld a covenant not to compete after subjecting it to a rule of reason test.[308] In this case the post-employment restraint arose after Harry Stoner (Stoner), the owner of a candy vending machine company, Stoner Manufacturing Corp., sold his business to Vendo Co. (Vendo).[309] As part of the sale, Stoner was to serve on Vendo's board of directors and was to be employed by the company for five years.[310] Vendo demonstrated at the district court stage that the company viewed Stoner as an asset to its board of directors and that it sought the value of his name and reputation in the market.[311] As part of the agreement, Vendo entered into an employment contract with Stoner that included a post-employment restraint that restricted Stoner from conducting business, investing in businesses, or being employed or in any other way affiliated with businesses in the vending machine trade for the length of employment and five years thereafter.[312] The covenant restricted Stoner's activities in any territory that Vendo or its

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306 *See, e.g.*, Compton v. Metal Prods., Inc., 453 F.2d 38, 44 (4th Cir. 1971) (invalidating covenant restricting activity in metal products business world-wide for 20 years under patent law but noting its probable invalidity under Sherman Act because of the unreasonableness of its scope and duration).

307 However, the court in *Newburger* noted that some covenants could potentially have an adverse impact on the public. The *Newburger* court noted that:

> we [have] expressed some concern over whether the federal antitrust laws should be brought to bear on employer-employee controversies which individually have only a small impact on commerce and which have traditionally been handled in state courts. . . . On the other hand, it has been argued that involvement of the federal courts is needed because widespread use of overbroad post-employment restrictions is causing serious anticompetitive harm to the national economy.

Newburger, Loeb & Co. v. Gross, 563 F.2d 1057, 1082 (2d Cir. 1977) (citing Goldschmidt, *supra* note 95).

308 660 F.2d 255 (7th Cir. 1981).

309 *Id.* at 257-59.

310 *Id.*

311 *Id.* at 258 (company executive stating: "We thought Harry Stoner would be an asset to our board of directors. He had a fine reputation in the industry, and we thought the name of his equipment was helpful.").

312 *Id.* at 258-59.

subsidiaries were conducting business at the time the contract was entered into between the parties.[313]

After the relationship between Vendo and Stoner deteriorated, Stoner became involved with and eventually supported publicly the Lektro-Vend Company (Lektro-Vend), a newly formed competitor of Vendo that was developed by former Stoner employees through the investment and support of Stoner and his family.[314] After Stoner's employment with Vendo terminated, Vendo sued Stoner for breach of contract for his actions with Lektro-Vend and was awarded damages in state court.[315] Stoner then sued Vendo in federal court seeking preliminary injunction against Vendo's collection of damages and claiming that the post-employment restraint violated the Sherman Act.[316] The district court found the covenants valid under the Sherman Act and Stoner appealed.[317]

The Court of Appeals held that the covenant was ancillary to the employment contract (which was ancillary to the sale of Stoner Enterprises to Vendo), and as such, that the covenant was not illegal per se and must be analyzed under the rule of reason.[318] The court then held that "Vendo's interests in protecting its (1) acquired goodwill, and (2) any trade secrets or clientele to which Stoner might potentially have access ... were not insubstantial," and that "the payment of money in the form of the acquisition price and salary is one factor tending to support the district court's finding that the noncompetition covenants were executed to protect Vendo's legitimate interests."[319] The court further held that "Vendo sought only to enforce the covenants in this case only as to clearly reasonable time, space, and product limitations."[320] Finally, the court held that "any rule of reason analysis requires a showing of anticompetitive market effect," and affirmed the district court's finding that "because plaintiffs did not establish the required [section one] showing of adverse impact upon competition in the relevant market, they failed to prove that the covenants were unreasonable under the rule of reason test."[321] Thus, the court upheld the covenants against Stoner's antitrust challenges.

Similarly, in 1983, in *Consultants & Designers, Inc. v. Butler Service Group, Inc.*,[322] the Eleventh Circuit Court of Appeals upheld a covenant not to compete after analyzing it under the rule of reason test. In this case, both

313 *Id.*
314 *Id.* at 260-61.
315 *Id.* at 261-62.
316 *Id.*
317 *Id.* at 262.
318 *Id.* at 265.
319 *Id.* at 266
320 *Id.* at 267.
321 *Id.* at 267-68.
322 720 F.2d 1553 (11th Cir. 1983)

Consultants & Designers, Inc. (C&D) and Butler Service Group, Inc. (Butler) were large firms in the technical service industry which acted as middlemen, providing highly skilled, relatively mobile, and technically trained workers in fields such as engineering, designing, drafting, and data processing through contractual arrangements with technical firms.[323] The dispute between the two companies arose when Butler's contract with the Tennessee Valley Authority (TVA) to provide design and construction workers for its nuclear power plant project expired, and TVA decided to employ C&D rather than renew the contract with Butler.[324] The problem was that Butler's contract with TVA had a covenant which restricted employees contracted by Butler from working for TVA, or any other technical service firm on TVA projects, for ninety days following the termination of Butler's contract.[325] When C&D tried to hire Butler employees for the TVA project, Butler sued and received injunctive relief in state court. C&D then filed suit in the federal district court of the northern district of Alabama alleging a restraint of trade in violation of section one of the Sherman Act.[326] The district court ruled in favor of Butler, and C&D appealed to the Eleventh Circuit.[327]

The Eleventh Circuit Court of Appeals applied the rule of reason analysis and affirmed the district court by holding that the restriction did not violate section one of the Sherman Act.[328] The court started by noting:

> [T]he purpose of the per se rule is to dispose of cases quickly without the more detailed and costly inquiry required under the rule of reason test. It is to be applied, however, 'only when history and analysis have shown that in sufficiently similar circumstances the rule of reason unequivocally results in finding of liability under the Sherman Act....' To use the per se rule as a means of avoiding rule of reason analysis when it is unclear what the result would be under the rule would subvert the intention and purpose of the rule."[329]

Thus, the court declined to apply the per se doctrine.

Moving to the rule of reason analysis, the court noted that the questions of relevant market and market power must be "resolved as a unit."[330] The court then defined the relevant market. The court held that "[t]he relevant inquiry is not whether [the restraint's] present attempt to exclude adversely impacts competition but rather whether its acquisition of the power to exclude competitors had a sufficiently adverse impact on competition to

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323 *Id.* at 1555.

324 *Id.* at 1556.

325 *Id.*

326 *Id.* C&D also filed a claim under Section 2 of the Act, which is irrelevant here.

327 *Id.*

328 *Id.*

329 *Id.* at 1562.

330 *Id.*

constitute a violation of section one of the Sherman Act."[331] The court found that "Butler's restrictive covenant [had] an impact on two sets of parties, the job shopper and the client firm," but that "the record is clear that Butler serves a relatively small portion of the technical service market," and that "for the 1980 TVA contract [alone] Butler had to compete against sixteen other firms."[332] With Butler having such a small share of the technical service market, the court concluded that "in competing for job shoppers [as well as clients] the offer of a contract containing such a restrictive covenant seems, at first blush, to place Butler at a competitive disadvantage rather than an advantage vis-à-vis its competitors," and determined that the agreement had no anticompetitive effects.[333]

Essentially, the *Butler* court decision was that given the large number of available job shoppers, and the large number of technical firms providing the same services in the same geographical area, the agreement hindered Butler's competition rather than enhanced it. The majority of job shoppers, as well as the potential clients in the area, would rather work for or employ other technical service firms than agree to such restrictions. With the substantial number of available alternatives, Butler was hindering rather than promoting its competitive edge. Thus, the restriction could have anticompetitive effects only for Butler, and, having decided that there was no possibility of the covenant having an anticompetitive effect on consumers, the restraint could not possibly violate section one of the Sherman Act.[334]

Thus, the federal courts have departed from the state analysis of covenants not to compete and have instead turned to a more sophisticated antitrust analysis. Unlike the state court's focus on the duration and scope and factors focusing on harm to the contracting parties, the federal courts have turned their focus toward consumer harm in a relevant market.

CONCLUSION

We have presented a comprehensive framework for assessing the validity of post-employment covenants not to compete, taking advantage of the insights of the law and economics discipline. Under this framework, such covenants should not be enforced only when some type of market fail-

331 *Id.*

332 *Id.* at 1562-63

333 *Id.* at 1563-64.

334 Even though the *Butler* court did not need to apply the final balancing test, having determined there could not possibly be an anticompetitive effect, it did apply the factual reasonableness test under a different part of the claim and found the restriction to be reasonable in duration and scope and that it served a legitimate business objective. *Id.* at 1557-59. Thus, even if the court determined the restraint to have potentially anticompetitive effects, it is likely the restraint would have been upheld by its overall reasonableness.

ure occurs. The types of failure that can occur fall into three categories: (a) imperfect (including asymmetric) information; (b) constrained choice; and (c) externalities. Under the first two types, the effects are limited to the parties to the contract; under the third type, the impact is on the public. For the first two types, standard contract defenses are indicated. For the third type, restraint of trade and the rule-of-reason as originally applied in common law and implemented in the Sherman Act is the relevant approach. While the latter has seldom been applied to post-employment covenants until now, the rising importance of high-technology industries and the concomitant emphasis on innovation make this approach increasingly attractive and relevant for assessing the appropriateness of post-employment covenants not to compete.

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Analyzing the Non-Competition Covenant as a Category of Intellectual Property Regulation

Charles Tait Graves

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Analyzing the Non-Competition Covenant as a Category of Intellectual Property Regulation

by CHARLES TAIT GRAVES*

I. Introduction

This essay proposes a new critique of the employee non-competition covenant: When we examine such covenants as a category of intellectual property regulation, they do not meet the criteria that commonly justify intellectual property laws. Restrictive covenants are not narrowly tailored to protect only new, creative information, they provide no incentives for innovation beyond those already found in trade secret law, and they provide little balance between the needs of individual, innovative employees and the interests of their more powerful employers.

The employee non-competition covenant is a category of intellectual property regulation, but it is rarely recognized as such. This means that the rigorous criteria often seen in critiques of intellectual property law are largely absent in the commentary about non-competes—and absent in judicial decisions as well.

This is surprising. First, courts frequently justify non-competes on trade secret-like, intellectual property grounds. If courts tell us that this is why they enforce restrictive covenants, that justification should be analyzed. Second, the non-competition agreement has always been controversial. In an economy where non-unionized, at-will employment is dominant, the degree to which an employer can restrict the future job choices of a departing employee naturally generates strong—and polarized—opinions. One would expect sophisticated critique from every angle.

There is, to be sure, a mass of scholarly and practitioner commentary on the subject. The sheer volume of such material might signal that everything that can be said on the subject has been

* Partner at Wilson Sonsini Goodrich & Rosati, San Francisco, and adjunct faculty at U.C. Hastings College of the Law.

exhausted. But this is not so. Indeed, although the case law indicates that protecting intellectual property is a reason why courts so often affirm restrictive covenants, few have asked the foundational question: is the non-competition covenant a sensible way to regulate intellectual property?

To ask the question is already to be skeptical, and the skepticism is warranted. An intellectual property analysis calls for laws which promote investment in innovation subject to rational boundaries that avoid overprotection, encourage competition by skilled individuals to develop new ideas, create a zone of unprotected information so that all can benefit from a robust public domain, and match the remedies available to rights-holders to specific infringements. We have become used to debating these points as they apply to different aspects of patent, trade secret, and copyright law.

Applying these considerations to the non-compete is revealing. As an alternative form of trade secret regulation, the covenant not to compete is a blunt instrument—crude overprotection that does not pretend to the fine-grain analysis possible under trade secret and other areas of intellectual property law. Its implicit biases, its modes of rhetoric, and the unbalanced hierarchies it promotes provide few of the safeguards and balances found in trade secret law.

The restrictive covenant instead incentivizes local monopoly, restricts the use of non-secret, public domain information, and indiscriminately subjects departing employees to punitive restraints, whether or not each would later engage in trade secret misappropriation. This is a stark contrast with trade secret law, which is better balanced and has become more so in recent years as courts have tightened loopholes which gave unwarranted power to parties alleging misappropriation.

For these reasons, we should question seriously the trade secret-like justifications courts often give for non-competition covenants. This essay aims to jump-start that analysis. As a form of intellectual property law, what does the restrictive covenant do best, and when is it ineffective? What are its implicit assumptions and biases? Whose position is privileged in a dispute, and why? If there is a philosophy of the non-compete, what is it? Highlighting how the non-competition contract functions outside the courtroom—which may be distinct from what courts and litigants say about it during lawsuits—will make its implicit policy aims explicit.

To explore these questions, this essay will first analyze how non-competes operate as an alternative form of intellectual property regulation, but lack the detail-oriented, balanced approach found in trade secret law. It will then review the three major approaches to the non-competition covenant: the balancing of particular factors in the traditional "legitimate interests" test, the critique of restrictive covenants for inhibiting regional economic growth (the "regional economy" approach), and the Law and Economics approach that promotes robust enforcement of restrictive covenants.

With this background, we will use the framework of intellectual property debates—what is protectable, what is not, who can be liable, and the scope of powers information holders should receive—to develop a fifteen-point synopsis of the implicit policies of restrictive covenant law.

This approach will require those who defend non-competes—particularly from the Law and Economics perspective—to answer questions that traditionally have not been posed. Indeed, the disproportionate influence of that perspective in the commentary may be one reason that serious theorizing about the non-compete has ignored an intellectual property analysis. We will explore how the Law and Economics approach brushes past the question whether trade secret law poses a balanced alternative to the non-compete through a set of often-repeated but unconvincing arguments.

At the same time, using an intellectual property analysis to expose policies the non-competition agreement implicitly promotes can help sharpen the analysis under the other common approaches. In particular, this approach can act as a helpful supplement to the critique of the non-compete under the regional economy analysis. Exploring the shortcomings of the non-compete can provide new insights for how successful regional economies can protect trade secrets while limiting or abolishing overbroad, unbalanced restrictive covenants.

In short, this essay offers the following propositions:

- Restrictive covenants operate primarily as a crude form of trade secret law;
- Restrictive covenant law contains a set of implicit hierarchies that strongly favors anticompetitive employers over innovative departing employees;
- Restrictive covenants are immensely overbroad as intellectual property regulation, both in the information they protect and the class of individuals they restrict;
- Restrictive covenant law ignores the availability of a better-calibrated alternative, statutory trade secret law; and
- Intellectual property-based analysis of the restrictive covenant exposes shortcomings in the Law and Economics-based defense of

such covenants, and can also serve as an effective supplement to critiques of the non-compete, particularly those based on theories of regional innovation.

This is a theoretical paper meant to suggest avenues for empirical research and a more careful framework for analyzing how non-compete covenants function. As such, this essay is necessarily wide-ranging and speculative. By making explicit the structure of unspoken ideas and assumptions that support restrictive covenants, we can more directly question their legitimacy.

II. The Non-Compete as Primitive Category of Trade Secret Law

Non-competition covenants—clauses in employment contracts that forbid competition by a departing employee against the former employer for some set period of time—affect skilled employees in most jurisdictions across the country.[1] They are frequently litigated, and have been the subject of innumerable law review articles. As far back as 1976, a California court bemoaned the confusing mass of commentary on the subject.[2]

Despite the number of published decisions and articles, covenants not to compete are strangely under-analyzed, especially as a category of intellectual property regulation. This is surprising given the American economy's shift to shorter-term, non-union

1. This essay assumes the reader's familiarity with the common law of restrictive covenants and for that reason will skip the historical background and descriptions of common law tests for enforceability that often appear at the beginning of scholarly articles on the subject. For background reading, *see generally* Harlan M. Blake, *Employee Agreements Not to Compete*, 73 HARV. L. REV. 625 (1960); John D. Ingram, *Covenants Not to Compete*, 36 AKRON L. REV. 49 (2002); Brian M. Malsberger, COVENANTS NOT TO COMPETE: A STATE-BY-STATE SURVEY (3rd ed. 2002); James Pooley, TRADE SECRETS § 8.04 (2010); RESTATEMENT (SECOND) OF CONTRACTS §§ 187–88 (1979). For the same reason, this essay does not address statutes—like those found in Colorado, Florida, Montana, and Oregon—or common law rules that alter the specific analysis for enforceability in particular states, because the focus here is on reevaluating the criteria for restrictive covenants at a national level.

2. *See* Monogram Indus. v. Sar Indus., 134 Cal. Rptr. 714, 718 (Cal. Ct. App. 1976) ("Covenants not to compete have been the subject of a considerable amount of attention from legal writers and courts. The number of texts, treatises, and judicial opinions that have been written in the field constitutes a 'sea—vast and vacillating, overlapping and bewildering' and the sheer volume can 'drown the researcher.'" (quoting Arthur Murray Dance Studios v. Witman, 105 N.E.2d 685, 687 (Ohio Com. Pl. 1952))).

employment and the ever-growing importance of intellectual property.[3]

Perhaps there are simple explanations. Restrictive covenants may be seen primarily as a form of contract or employment law, and thus exempt from the rigorous scrutiny and debate that exists for other types of intellectual property regulation. Similarly, covenants not to compete have such deep historical roots, and are so commonly accepted in many jurisdictions, that a fog of familiarity and rote repetition may have long settled over the subject.[4] In any given litigation, courts and parties move directly to how best to balance multi-factor tests for enforceability without stopping to reflect on the

3. The critique of the non-compete is part of the larger debate over the relative rights of employers and employees as to intellectual property in the contemporary economic context of high mobility. *See generally* Catherine L. Fisk, *Reflections on the New Psychological Contract and the Ownership of Human Capital*, 34 CONN. L. REV. 765 (2002); Katherine V.W. Stone, *Human Capital and Employee Mobility: A Rejoinder*, 34 CONN. L. REV. 1233 (2002) (agreeing on the changing status of employees and employment and the importance of questioning intellectual property restrictions, but disagreeing on best legal strategies to protect employee interests); Catherine L. Fisk, *Knowledge Work: New Metaphors for the New Economy*, 80 CHI.-KENT L. REV. 839 (2005) (also describing changes in the concepts of employment held by both employers and employees under conditions of greater mobility and arguing for employee stakes in intellectual property). The severe economic downturn which began in 2007 heightens these concerns.

4. Today's non-competition and non-solicitation rules derive in part from centuries-old English law, and may share a family resemblance with unsavory aspects of England's control of free labor mobility by upper class landowners and factory owners. For the legal scholar with time and resources, there may be a substantial paper to be written illuminating these connections, to highlight the ways in which courts have helped powerful interests control employee mobility. *See generally* KAREN ORREN, BELATED FEUDALISM: LABOR, THE LAW, AND LIBERAL DEVELOPMENT IN THE UNITED STATES 71–79, 104–107 (Cambridge Univ. Press 1991) (describing areas where centuries-old English labor relationships and hierarchies found their way into American employment law, including the non-competition and non-solicitation covenant); RAYMOND WILLIAMS, THE COUNTRY AND THE CITY 85 (Oxford Univ. Press 1973) (Addressing a 1662 statute that sought to limit poor farmers and laborers from moving "from one parish to another" in search of better commons, Williams writes: "There had been many such previous attempts to restrain such men and women from seeking their living. There had been license systems, since the fourteenth century, for any servant or labourer leaving his parish; certificates from employers, to show they were really 'at liberty'; the controlling machinery of the Statute and Hiring Fairs."). At the same time, enforcement of non-competes has by no means been uniform over the centuries. In early nineteenth century America, covenants were rare and met judicial hostility. *See* CATHERINE L. FISK, WORKING KNOWLEDGE: EMPLOYEE INNOVATION AND THE RISE OF CORPORATE INTELLECTUAL PROPERTY, 1800–1930 29–30, 175 (Univ. N. Carolina Press 2009) ("In the nineteenth century and before, however, such contracts were not a legally permissible device to protect workplace secrets."; "Patent law, copyright law, trade secret law, and the enforcement of non-compete agreements expanded the rights of employers dramatically between 1895 and 1930.").

distribution of power and underlying assumptions inherent to the non-compete. Published cases involving non-competition agreements are often routine, with little variation or complex analysis.

Above all, we generally do not think of non-competition covenants in employment contracts as a category of intellectual property regulation.[5] In the minds of courts, practitioners, academics, and law students, the term "IP" chiefly means patent and copyright law, with trademark and trade secret law in the background. What we view as "IP" is subjected to detailed policy, economic, and empirical analyses, with spirited debate and prescriptions over how best the laws should be calibrated to encourage innovation. What we do not view as "IP," by contrast, avoids that scrutiny.

Despite this tradition, there can be little doubt that restrictive covenants are, by and large, premised on protection of trade secrets—confidential technical, business, or customer-related information. This is what the case law overwhelmingly says[6] and commentators generally agree. Restrictive covenants are therefore a form of intellectual property regulation and should be recognized as such. Such covenants constitute an alternative category of trade secret law, separate from tort law claims for misappropriations of trade secrets and breach of contract claims for violations of nondisclosure agreements.

5. There are other forms of non-competition covenants outside the purview of this analysis. For example, covenants not to compete based on sale of a business are designed to preserve the intangible goodwill associated with the business being transferred. *See generally Monogram Indus.*, 134 Cal. Rptr. at 718–19 (distinguishing sale-based covenant not to compete from the employment-based covenant); *see also* Cnty. Materials Corp. v. Allan Block Corp., 502 F.3d 730, 732 (7th Cir. 2007) (example of non-competition covenant between patent-holder and company producing goods under contract for patent-holder). Whether or not these types of restrictive covenants are sensible would require a separate analysis.

6. An immense number of non-competition cases cite protection of confidential information as a justification for restrictions. Such case can be found in every state that allows restrictive covenants. *See generally* Malsberger, *supra* note 1 (describing trade secret protection as a basis for restrictive covenants in every state that permits them; collecting citations); *see also* Ingram, *supra* note 1, at 78 ("Those who favor enforceability stress a legitimate need of employers to protect the trade secrets, confidential information, and goodwill develop at a considerable expense over a period of time." (citing cases)); Pooley, *supra* note 1, at § 8.04[1] ("On the one hand, freedom of contract and the employer's interest in avoiding the challenge and uncertainty of litigation to prove trade secrets are seen as justifications for permitting such limitations."); Sampsa Samila & Olav Sorenson, *Non-compete Covenants: Incentives to Innovate or Impediments to Growth*, Danish Research Unit for Industrial Dynamics Working Paper No. 10-02 (Nov. 15, 2009) at 7 ("The most commonly discussed justification for enforcing non-compete agreements is to protect intellectual property rights.").

But restrictive covenants are not the same as trade secret law. Trade secret law is nuanced and balanced, and has become more so in recent years as courts have issued rulings to limit tactics which benefit litigants who bring weak or anticompetitive claims. A plaintiff must establish a claim to secret information, and courts increasingly require that the plaintiff identify that information with specificity to distinguish it from information in the public domain.[7] A defendant cannot be liable for using public domain information, even if he or she uses non-secret information learned from the plaintiff to compete against it.[8] A departing employee is free to use general skills, knowledge, and experience.[9] Courts cannot issue injunctions unless they precisely identify the information the defendant cannot use within the order granting relief.[10] In a recent, major advance, the majority of courts now block quasi-trade secret claims which seek to place restrictions on information said to be "confidential" but not secret.[11]

7. *See, e.g.*, Cal. Civ. Code § 3426.1(d) (West 2010) (Uniform Trade Secrets Act clause requiring secrecy). For recent cases requiring more specific trade secret claim identification early in a lawsuit, *see* Perlan Therapeutics, Inc. v. Super. Ct., 101 Cal. Rptr. 3d 211, 220–221 (Cal. Ct. App. 2009), review denied (Feb. 18, 2010) (affirming trial court's rejection of broadly-worded, pre-discovery trade secret identification statement that referred to an invention without specifically identifying it); Ikon Office Solutions, Inc. v. Konica Minolta Bus. Solutions, U.S.A., Inc., 3:08-CV-539-RLV-DCK, 2009 WL 4429156, at *3–4 (W.D.N.C. Nov. 25, 2009) (requiring better identification of trade secret claims in interrogatory responses); Giasson Aerospace Sci., Inc. v. RCO Eng'g, Inc., 08-13667, 2009 WL 1384179, at *2 (E.D. Mich. May 14, 2009) (requiring identification of trade secret claims with reasonable particularly before taking discovery from the defendant); Knights Armament Co. v. Optical Sys. Tech., Inc., 254 F.R.D. 463, 467 (M.D. Fla. 2008), *aff'd*, 254 F.R.D. 470 (ordering identification of "all" alleged secrets in discovery response).

8. *See, e.g.*, Ultimax Cement Mfg. Corp. v. CTS Cement Mfg. Corp., 587 F.3d 1339, 1355 (Fed. Cir. 2009) (applying California UTSA; no liability if information is non-secret even if defendant first obtained it from plaintiff).

9. For a recent expression of this oft-cited principle, *see* Sys. Dev. Services, Inc. v. Haarmann, 907 N.E.2d 63, 74 (Ill. App. Ct. 2009), *appeal denied*, 919 N.E.2d 366 (2009) (products and services that are within the industry's general skills and knowledge cannot be trade secrets).

10. For a recent case reversing an injunction under Federal Rule 65(d) for lack of specificity, *see* Patriot Homes, Inc. v. Forest River Hous., Inc., 512 F.3d 412, 415 (7th Cir. 2008) (reversing trade secret injunction where defendant would be uncertain whether information lawfully obtained from Freedom of Information Act requests was encompassed within the scope of the order).

11. For examples of cases taking the majority position on UTSA preemption (and thus barring alternative state law claims premised on information said to be non-secret but still protectable), *see* Diamond Power Int'l, Inc. v. Davidson, 540 F. Supp. 2d 1322, 1345–46 (N.D. Ga. 2007) (Georgia UTSA); Chatterbox, LLC v. Pulsar Ecoproducts, LLC, CV 06-512-S-LMB, 2007 WL 1388183, at *2–5 (D. Idaho May 9, 2007) (Idaho UTSA); Hauck Mfg. Co. v. Astec Indus., Inc., 375 F. Supp. 2d 649, 661 (E.D. Tenn. 2004) (Tennessee

None of these limitations—which can protect departing employees from overbearing claims brought by former employers—are found in the law of restrictive covenants. In other words, although courts tell us that the non-competition agreement functions as an alternative type of trade secret regulation, it is a curious alternative, seemingly free of the procedural and substantive safeguards found in the official law of that subject.[12]

If courts are providing an intellectual property-based rationale as their primary justification for enforcing restrictive covenants, it is reasonable to weigh and assess their performance as intellectual property regulation. As we will see, this approach has largely been absent from the commentary.[13]

III. Problems with the Traditional Analyses

Initiating a critique of the restrictive covenant on intellectual property grounds requires explaining why this approach is new, given that the covenants have been the subject of so many law review articles over the years.

To be sure, there are scores upon scores of journal articles on restrictive covenants by scholars specializing in employment law, business law, health policy, management, and economics, and by practicing attorneys. Deep knowledge in particular fields generates different perspectives. On a separate track, there are probably scores of litigations that involve non-competition clauses around the

UTSA); Silvaco Data Sys. v. Intel Corp., 109 Cal. Rptr. 3d 27, 48–54 (Cal. Ct. App. 2010) (California UTSA).

12. *See* Rachel S. Arnow-Richman, *Bargaining for Loyalty in the Information Age: A Reconsideration of the Role of Substantive Fairness in Enforcing Employee Noncompetes*, 80 OREGON L. REV. 1163, 1183, 1185 (2001) (noting that courts in non-compete cases do not apply the detailed standards found in trade secret law despite reflecting a "sister interest" in information protection.) This article draws different conclusions from this problem as will be discussed in more detail below.

13. One major exception is a 1984 article by Phillip J. Closius and Henry M. Schaffer, which critiqued the restrictive covenant for purporting to protect any legitimate interest beyond those already found in trade secret law. *See* Phillip J. Closius & Henry M. Schaffer, *Involuntary Nonservitude: The Current Judicial Enforcement of Employee Covenants Not to Compete – A Proposal for Reform*, 57 S. CAL. L. REV. 531, 532 (1984) ("Under this approach, the terms of any agreement will generally be viewed as superfluous."). This article appears to have fallen on deaf ears, perhaps because trade secret law was not nearly as coherent and well-developed in 1984 as it is today. The growing sophistication, calibration, and balance of trade secret law now provide an even more forceful argument for the authors' conclusions.

country, year after year.[14] It is a challenge to say something new, and to add value to the existing debates.

There are three general approaches in the literature on non-competition covenants (excluding practice guides and case summaries). One, what we might call a balancing approach, seeks to work within the existing framework courts use—the "legitimate interests" test—to suggest reforms generally (but not always) for the benefit of departing employees. A second focuses on the macroeconomic effect of restrictive covenants on the growth and development of regional innovation clusters—the "regional economy" approach. The third, based on Law and Economics reasoning, seeks to justify (and sometimes strengthen) restrictive covenants primarily by arguing that they provide an incentive for employers to provide on-the-job training and to avoid the trouble of having to prove employee wrongdoing in trade secret litigation.

None of these approaches, however, directly treats the non-competition covenant as a form of intellectual property regulation, or highlights its implicit policies for regulating the flow of information—though the regional economy approach comes closest. A review of these approaches will illustrate why the intellectual property analysis is useful and—especially in the case of the Law and Economics theories—lead to different conclusions about the efficacy of the restrictive covenant.

A. Balancing Tests, Specific Problems, and Profession-Specific Reform

The most common approach to analyzing the non-competition contract is to propose reform on a particular point, usually within the existing framework of judicial analysis (the so-called "legitimate interests" test). This approach makes good sense, because convincing a judge to take action he or she can engage in without departing from

14. The author worked on the Pooley treatise on trade secret law for three years. Updating the chapter on non-competition covenants was easy: there were always plenty of new decisions. The problem was finding cases that said anything new. Most decisions are routine, formulaic expressions of common law tests, whether or not the court enforced the contract. Separately, counting the exact number of lawsuits over restrictive covenant lawsuits would be difficult. There are many unpublished appellate rulings, and there is an unknown number of lawsuits in state trial courts whose rulings are not available on legal databases. Some disputes may settle early, before any court ruling. Although there is an impressive recent study attempting to map published trade secret cases in federal courts, there appears to be no similar empirical effort regarding non-competition agreements. *See generally* David S. Almeling, Darin W. Snyder, Michael Sapiznikow, Whitney E. McCollum & Jill Winder, *A Statistical Analysis of Trade Secret Litigation in Federal Courts*, 45 GONZ. L. REV. 291 (2010).

precedent seems most likely to generate concrete results in real cases. Representative articles include those that examine the viability of a non-competition covenant when the employer fires or lays off the employee,[15] and those that ask what law should apply to employees who work from home across state lines.[16] Others analyze problems with restrictive covenants entered into after the employment has begun, and the "in terrorem" effects of overbroad form contract terms.[17] Some commentators recommend that states pass statutes to provide better guidance for employees and more stringently require employers to prove irreparable harm before issuing an injunction to enforce a restrictive covenant.[18] Finally, some advocate using different tests to create different results for different categories of departing employees.[19]

Not every writer who seeks to reform judicial analysis of the non-compete is a strong critic of the covenants; some offer proposals that would preserve them while lessening the blow on the departing employee. One such article proposed adopting England's "garden leave" approach, where the employer pays the departed employee during the pendency of the restrictive covenant.[20]

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15. *See* Kenneth J. Vanko, *'You're Fired! And Don't Forget Your Non-Compete . . .': The Enforceability of Restrictive Covenants in Involuntary Discharge Cases*, 1 DEPAUL BUS. & COM. L.J. 1 (2002) (fascinating, in-depth discussion of conflicting case law in different types of employee termination and separation scenarios).

16. *See, e.g.*, Emily J. Kuo, *The Enforceability Gap of Covenants not to Compete in Telecommuting Employment Relationships*, 1996 U. CHI. LEGAL F. 565 (1996).

17. *See* Rachel Arnow-Richman, *Cubewrap Contracts and Worker Mobility: The Dilution of Employee Bargaining Power via Standard Form Noncompetes*, 2006 MICH. ST. L. REV. 963, 984–91 (2006) (recommending required pre-hire disclosure of restrictive covenants and looking to industry standards to encourage more narrowly-drafted contract terms to avoid employer overreaching).

18. *See* Angela M. Cerino, *A Talent is a Terrible Thing to Waste: Toward a Workable Solution to the Problem of Restrictive Covenants in Employment Contracts*, 24 DUQ. L. REV. 777, 802–08 (1985–86).

19. *See, e.g.*, Norman D. Bishara, *Covenants Not to Compete in a Knowledge Economy: Balancing Innovation from Employee Mobility Against Legal Protection for Human Capital Investment*, 27 BERKELEY J. EMP. & LAB. L. 287, 317–21 (2006) (reviewing existing debates under both the regional economy and Law and Economics approaches, finding merit in both, and recommending that courts lessen restrictions on innovative employees such as engineers while maintaining restrictions for "knowledge service workers" such as investment bankers and journalists).

20. *See* Greg T. Lembrich, Note, *Garden Leave: A Possible Solution to the Uncertain Enforceability of Restrictive Employment Covenants*, 102 COLUM. L. REV. 2291, 2302, 2314–22 (2002) (arguing that "garden leave" reduces problems in the current law of restrictive covenants, such as unequal bargaining power and the uncertainty in how courts will treat any given covenant in a litigation).

Scholarly and practitioner commentary proposing reform on specific issues also focuses on the applicability of non-competes to particular occupations. The special policy issues inherent in covenants aimed at departing physicians—questions of patient choice and accessibility to care—have generated intense interest, and perhaps the most articles specific to any profession.[21] Covenants within the broadcasting industry have also generated an unusual amount of commentary.[22]

B. Regional Innovation and Comparative Analysis

A second approach to the non-compete takes a more structural approach and asks how enforcement of non-competes affects regional

21. *See, e.g.*, Kevin D. Koons, Note, *Physician Employee Non-Compete Agreements on the Examining Table: The Need to Better Protect Patients' and the Public's Interests in Indiana*, 6 Ind. Health L. Rev. 253, 257 (2009); S. Elizabeth Wilborn Malloy, *Physician Restrictive Covenants: The Neglect of Incumbent Patient Interests*, 41 WAKE FOREST L. REV. 189, 191 (2006) ("Physician restrictive covenants can inhibit the formation of long-term relationships between physicians and patients and, thus, result in a lesser quality of care for the patient."); Mike J. Wyatt, Note, *Buy Out or Get Out: Why Covenants Not to Compete in Surgeon Employment Contracts are Truly Bad Medicine*, 45 WASHBURN L. J. 715 (2006) (critique of such covenants in Kansas based on analysis of surgeons' referral systems); Derek W. Loeser, *The Legal, Ethical, and Practical Implications of Noncompetition Clauses: What Physicians Should Know Before They Sign*, 31 J.L. MED. & ETHICS, 283 (2003) (advocating "physicians to carefully consider whether to accept contracts that contain [such covenants], or at the very least to negotiate for the least restrictive terms possible."); James W. Lowry, Commentary, *Covenants not to Compete in Physician Contracts*, 24 J. LEGAL MED. 215 (2003) (summary noting conflicting case law and recent trends); Paula Berg, *Judicial Enforcement of Covenants not the Compete Between Physicians: Protecting Doctors' Interests at Patients' Expense*, 45 RUTGERS L. REV. 1, 5–6, 30–36 (1992–93) (arguing for abolition of restrictive covenants for physicians based on patients' interests).

22. *See generally* Cathy Packer & Joanna Cleary, *Rediscovering the Public Interest: An Analysis of the Common Law Governing Post-Employment Non-Compete Contracts for Media Employees*, 24 CARDOZO ARTS & ENT. L.J. 1073, 1110–20 (2006–07) (noting public interest in greater mobility of media employees); Cristin T. Kist, Comment, *Blocked Airwaves: Using Legislation to Make Non-Compete Clauses Unenforceable in the Broadcast Industry and the Potential Effects of Proposed Legislation in Pennsylvania*, 13 VILL. SPORTS & ENT. L.J. 391, 419–22 (advocating limits on such covenants) (2006); Marlo D. Brawer, Note, *Switching Stations: The Battle Over Noncompete Agreements in the Broadcasting Industry*, 27 OKLAHOMA CITY UNIV. L. REV. 693, 694, 708–18, 734–35 (2002) (advocating same). *But see* Alice J. Baker, *Legislative Prohibitions on the Enforcement of Post-Employment Covenants Not to Compete in the Broadcasting Industry*, 23 HASTINGS COMM. & ENT. L.J. 647, 648, 675–84 (2000) (advocating preservation of non-competes in broadcasting industry on unconvincing grounds that broadcasting industry is no more anticompetitive than others and thus should not be singled out, that media employees often have unions to represent their interests, and that prohibition would not be "efficient" because it would block the supposed free will of contracting parties).

innovation and growth of technology-based enterprises. The theory is that strict enforcement of non-competes inhibits the development of start-up companies that engage in rapid innovation and support networks of high-skilled employees who move from job to job. This approach focuses on whether non-competes offer some explanatory guidance on the relative performance of regions such as Silicon Valley, Austin, Texas, North Carolina's Research Triangle, and Boston's Route 128.[23] Because the regional economy approach tends to focus on high-tech innovation, its insights are not necessarily applicable to all industries.[24]

The terms of the regional economy debate were largely set in the 1990s, but more recent scholarship continues to raise probing questions.[25] Some commentators have sought to test the hypothesis that employee mobility is greater in the absence of non-compete enforcement,[26] and another recent study found a correlation between

23. For a useful set of critical questions about the regional economy approach written during the dot-com era, *see* Jason S. Wood, *A Comparison of the Enforceability of Covenants Not to Compete and Recent Economic Histories of Four High Technology Regions*, 5 VA. J.L. & TECH 14 (2000).

24. This is a question raised in Kenneth G. Dau-Schmidt, *High-Velocity Labor Economics: A Review Essay of Working in Silicon Valley: Economic and Legal Analysis of a High-Velocity Labor Market by Alan Hyde*, 6 U. PA. J. LAB. & EMPL. LAW 847, 849, 857 (2004) ("How many industries are impacted by the information transmission aspect of the employment relationship to the extent that it drives the basic terms of that relationship?").

25. For a recent commentary applying the regional economy critique of employee mobility law to the international context and the Economic Espionage Act, *see* Shubha Ghosh, *Open Borders, Intellectual Property & Federal Criminal Trade Secret Law*, 9 J. MARSHALL REV. INTELL. PROP. L. 24 (2009). For a collection of symposium presentations on issues relating to the regional economy approach, *see* 1 ENT. BUS. L. J. 231–380 (2006); *see also* Yuval Feldman, *Experimental Approach to the Study of Normative Failures: Divulging of Trade Secrets by Silicon Valley Employees*, 2003 U. ILL. J.L. TECH. & POL'Y 105, 124–25 (2003) (noting research on the question of the effect of non-competes or their absence on regional innovation in study regarding attitudes and practices of employees towards confidential information).

26. *See* Bruce Fallick, Charles A. Fleischman, & James B. Rebitzer, *Job-Hopping in Silicon Valley: Some Evidence Concerning the Micro-Foundations of a High Technology Cluster*, 88 REV. ECON. STAT. 472–81 (2006) (finding higher mobility in the "computer industry" in Silicon Valley and elsewhere in California compares to regions that enforce non-competes, but not in other industries); April M. Franco & Matthew F. Mitchell, *Covenants Not to Compete, Labor Mobility, and Industry Dynamics*, 17 J. ECON. & MGMT. STRATEGY 581 (2008) (using theoretical models for maximization of information surplus in employment contracts involving skilled employees to ague that regions that do not enforce non-competes can "overtake" those that do); *see also* BENJAMIN A. CAMPBELL, MARTIN GANCO, APRIL M. FRANCO & RAJSHREE AGARWAL, WHO LEAVES, WHERE TO, AND WHY WORRY? EMPLOYEE MOBILITY, EMPLOYEE ENTREPRENEURSHIP, AND EFFECTS ON SOURCE FIRM PERFORMANCE, U.S. Census Bureau for Econ. Studies Discussion Paper CES 09-32 (Sept. 2009) at 9–12, 16, 26–27, 31 (using data from legal

urban areas in states that do not enforce non-competes and higher numbers for venture capital funding, patents, new companies, and overall employment.[27] The regional economy approach has received a great deal of scholarly attention but thus far has not been the subject of judicial discussion in the published cases.[28] Some have criticized the approach for failing to distinguish correlation (reduced enforceability of non-competes) from causation (of higher rates of innovation), and solely focusing on technology markets when non-competes are widely used in a variety of industries.[29]

This body of commentary comes closest to analyzing the non-compete as a form of intellectual property regulation, because it posits that non-competes restrict the flow of tacit skills and knowledge between technology companies. But it does not study exactly how such information is regulated or whether there is a more calibrated alternative to be found in trade secret law. For that reason, the ideas offered in this essay may provide a useful supplement for

services industry to support theory that higher-earning employees are less likely to leave a job, but more likely to join a start-up in the same industry when they do; not directly addressing non-compete enforcement).

27. *See* Samila & Sorenson, *supra* note 6, at 4, 12–23 (studying data from 328 urban areas; "Our results suggest that non-compete covenants strongly moderate the effect of venture capital on start-up activity, as well as on the economy as a whole."; "our results demonstrate that not only does the enforcement of non-compete agreements limit entrepreneurship . . . but it also appears to *impede* innovation.").

28. For example, Gilson's well-known 1999 article appears to have been cited by courts only twice. *See generally* Courtroom Sciences, Inc. v. Andrews, CIV.A.3:09-CV-251-0, 2009 WL 1313274, at *9 (N.D. Tex. May 11, 2009) (citing article for proposition that California "with its volatile 'Silicon Valley' economy" does not enforce most non-competition covenants); Bayer Corp v. Roche Molecular Sys., Inc., 72 F. Supp. 2d 1111, 1120 (N.D. Cal. 1999) (in re-affirming California's rejection of the "inevitable disclosure" theory under trade secret law, citing Gilson for proposition that "[t]o the extent that the theory of inevitable disclosure creates a de facto covenant not to compete without a nontrivial showing of actual or threatened use or disclosure, it is inconsistent with California policy and case law.").

29. *See* Wood, *supra* note 23. *But see* Samila & Sorenson, *supra* note 6, at 23 (disagreeing with Wood's conclusions: "Our results strongly suggest otherwise."); Feldman, *supra* note 25, at 128–30 (discussing potential problems with regional innovation approach, such as whether relative success of one region "was achieved at the expense of other parts of the United States," and thus not as significant an achievement); Fallick et al., *supra* note 26, at 3, 11–20 (suggesting that higher rates of employee mobility caused by California's lack of non-compete enforcement may be limited to the "computer industry"; "our analysis suggests that agglomeration economies observed in Silicon Valley's IT cluster out *not* to be a general economic phenomenon. Rather, they should arise in settings, like computers, where the gains from new innovations are both large and uncertain."); Franco & Mitchell, *supra* note 26, at 11 (disagreeing with Gilson that absence of non-compete enforcement largely benefits employers; arguing that non-competes "still benefit the employer" regardless of the amount of employee turnover).

those furthering the regional economy-based critique of the non-competition covenant.

C. Law and Economics-Based Training Justifications

A third approach to non-competes, a Law and Economics-based view, also examines the non-competition covenant as a whole, and asks whether its acceptance by the courts is beneficial. This approach seeks to justify restrictive covenants on purported "efficiency" grounds. Perhaps not surprisingly, commentators in this camp often find reasons to justify and promote the use of restrictive covenants.

The Law and Economics approach minimizes the analysis of restrictive covenants as a form of intellectual property regulation, and brushes past a comparison to trade secret law by arguing that trade secret law is not a valid alternative to the non-compete. Instead of analyzing the restrictive covenant as a form of intellectual property regulation, most articles in this tradition assert that the primary purpose of the non-compete is to protect the employer's (assumed) investment in training the employee.

Under this approach, the employer and employee are deemed to enter into a hypothetical bargain where the employee trades his or her right to compete against the employer after leaving the job in exchange for necessary job training.[30] One commentator argues that,

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30. *See, e.g.*, Mark A. Glick, Darren Bush, & Jonathan Q. Hafen, *The Law and Economics of Post-Employment Covenants: A Unified Framework*, 11 GEO. MASON L. REV. 357, 359 (2002) (promoting enforcement of restrictive covenants to enhance their "efficiency" "by reducing the risk that the careful drafting of the contract was all for naught."); Stewart E. Sterk, *Restraints on Alienation of Human Capital*, 79 VA. L. REV. 383, 391–92, 406–07 (1993) (assuming that protection of employer investment in specialized training is a valid basis for non-competition covenants: "To induce the employer to bear the cost of developing this firm-specific human capital, the employer must be assured a return on those development costs. Long-term contracts provide a mechanism—although not the only mechanism—for assuring that return."; asserting that enforcement of non-competition covenants is not anticompetitive because an employee could buy their way out if there were an alternative job possibility, assuming no effect on market competition without analyzing innovation theory in any way); Edward M. Schulman, *An Economic Analysis of Employee Noncompetition Agreements*, 69 DENV. U. L. REV. 97, 102, 108, 110, 115 (1992) (promoting non-competition covenants to protect purported employer investments in training); Maureen B. Callahan, Comment, *Post-Employment Restraint Agreements: A Reassessment*, 52 U. CHI. L. REV. 703, 716–17 (1985) (in perhaps the single most extreme commentary on restrictive covenants from the Law and Economics perspective, denying almost any negative aspects of such covenants and proposing that they be voidable only when they give rise to antitrust problems or if the contract formation was unconscionable); Paul H. Rubin & Peter Shedd, *Human Capital and Covenants Not to Compete*, 10 J. LEGAL STUD. 93, 99, 102 (1981) (examining purported economic rationale for non-competition covenants without analysis of particular industries and based on "the economic logic underlying the law"; assuming

for example, "[t]o induce the employer to bear the cost of developing this firm-specific human capital, the employer must be assured a return on those development costs. Long-term contracts provide a mechanism—although not the only mechanism—for assuring that return."[31] Another assumed that "contracts with such covenants occur almost entirely in industries and situations in which training is important."[32] Judge Posner has argued that "If covenants not to compete are forbidden, the employer will pay a lower wage, in effect charging the employee for the training."[33] Another asserted in a similar vein that "[a] lack of protection against employee mobility acts as a 'double hit' to the employer, which not only loses its monetary investment in developing the employee's skill set but also sacrifices potential market advantage to the competitor who is able to enlist the recently departed employee."[34]

Commentators working under this framework often pose an unrealistic view of the power imbalance between the employer and employee, and operate with a model that imagines employers and employees sitting down to calculate their respective marginal gains and losses from future activities should they enter the covenant.[35]

without evidence that "contracts with such covenants occur almost entirely in industries and situations in which training is important"; asserting that "such contracts are needed to efficient levels of investment in training when the person receiving training is unable to pay for the human capital by accepting reduced wages."); *see also* Gillian Lester, *Restrictive Covenants, Employee Training, and the Limits of Transaction-Cost Analysis*, 76 IND. L.J. 49, 68–69, 71–76 (2001) (noting flaws in the standard Law and Economics analysis promoting enforcement of restrictive covenants across the board, but downplaying the trade secret alternative and cautiously advocating some forms of repayment and liquidated damages terms for restrictive covenants).

31. *See* Sterk, *supra* note 30, at 392.

32. *See* Rubin & Shedd, *supra* note 30, at 99.

33. *See* Outsource Int'l, Inc. v. Barton, 192 F.3d 662, 670 (7th Cir. 1999) (Posner, J. dissenting) (expressing reasons for supporting restrictive covenants in a dissenting opinion; "I can see no reason in today's America for judicial hostility to covenants not to compete.").

34. *See* Brandon S. Long, Note, *Protecting Employer Investment in Training: Noncompetes v. Repayment Agreements*, 54 DUKE L.J. 1295, 1302 (2005) ("The free-rider principle provides an additional rationale: if the employer has no way to protect its investment, competitors reluctant to invest in training can recruit well-trained employees without having to assume the cost of the training.").

35. *See, e.g.*, Sterk, *supra* note 30, at 406 (arguing that restrictive covenants are not really anticompetitive because "nothing prevents the employee from bargaining with his employer for release from the covenant."; "the employee should be willing to pay the employer to release him from the covenant."); Glick, *supra* note 30, at 381–89 (imagining a "hypothetical negotiation" between employer and employee with different amounts of information about the future value of the contract; asserting that, with sufficient information, an employee "would not enter into the contract unless the post-contract state

At the same time, the Law and Economics approach downplays whether restrictive covenants should be analyzed as intellectual property regulation, though—somewhat inconsistently—some agree that courts frequently affirm restrictive covenants on trade secret protection grounds.[36]

Although commentators using a Law and Economics model do not deny that restrictive covenants concern protection of trade secrets, they do not engage in an intellectual property analysis about promoting innovation. They do not ask whether narrower, more focused regimes like official trade secret law do a better job of covering the same ground. [37]

To downplay whether the restrictive covenant is primarily a form of intellectual property regulation, and to downplay whether trade secret law might serve as a more balanced alternative, commentators

of affairs was superior."); Callahan, *supra* note 30, at 723 (arguing that "the fear of overreaching by employers diminishes" if "relatively sophisticated" employees have "alternative employment opportunities"—assuming that other employers don't all use restrictive covenants as well—and "The solicitous treatment of employee assumes that they are both fungible and overabundant."—a phrase which perhaps inadvertently gives away the implicit view that employees are cogs); Schulman, *supra* note 30, at 105 ("it is not to an individual's advantage to restrict his mobility unless he is promised more than what he believes his MRP [marginal revenue product of labor] to be."); Rubin & Shedd, *supra* note 30, at 95 ("Presumably, since both parties voluntarily sign the agreement, it must serve to increase the value of resources.").

Not every training-based justification for non-competes falls within the Law and Economics framework with its artificial focus on the hypothetical rational calculations of parties at the time of contract formation. A more original and probing commentary recognizes that "it may be inappropriate to view non-compete terms at the product of reasoned reflection or as dispositive of the parties' rights and obligations," but nonetheless argues that employers can have an "ownership" type interest in employee's general skills, training (both formal and informal), and information learned on the job. *See* Arnow-Richman, *Bargaining for Loyalty*, *supra* note 12 at 1215, 1202–06 (arguing for recognition of employer interests "regardless whether the training involves trade secrets or other proprietary information as required under existing law," and extending to "the informal acquisition of new knowledge by more experienced workers.").

36. *See* Lester, *supra* note 30, at 54–55 ("Trade secrets are the least controversial protectable interest."); Long, *supra* note 34, at 1309 ("Many commentators agree that the two interest most in need of protection are trade secrets and customer lists."); *Outsource Int'l*, 192 F.3d at 170 (Posner, J. dissenting) ("The clearest case for such a covenant is where the employer's work gives him access to the employer's trade secrets."); Sterk, *supra* note 30, at 399 ("Courts routinely enforce restrictive covenants when convinced that enforcement is necessary to protect an employer against his former employer's use of trade secrets or customer information acquired from the employer.").

37. *See, e.g.*, Eric A. Posner & George G. Triantis, *Covenants Not to Compete From an Incomplete Contracts Perspective*, U. OF CHI. JOHN M. OLIN PROGRAM L. & ECON. WORKING PAPER NO. 137 (2d Series) 16 (Sept. 26, 2001) (noting that trade secrets are a basis to enforce a restrictive covenant "subject to limits to prevent overreaching" without detailed analysis).

from the Law and Economics perspective have developed a three-part, standardized dismissal of these issues. First, commentators make a generalized argument that restrictive covenants provide employers with an incentive to develop trade secrets,[38] or to efficiently share them with employees in the course of their job responsibilities.[39] One author asserted that "[i]f noncompetes are not enforced, employers will lack the incentive to spend money creating trade secrets and customer lists."[40] That trade secret law might offer a more balanced alternative is downplayed, or ignored—as if a chaotic world of self-help is the only alternative to the restrictive covenant.[41]

Second, Law and Economics commentators argue that a non-competition covenant is easier for an employer to enforce than detecting and litigating actual misuse of trade secrets by departing employees, and that this in itself justifies the non-compete over trade secret law.[42] Third, they argue without evidence that trade secret litigation causes trade secrets to leak during court proceedings.[43]

38. *See* Long, *supra* note 34 at 1303 (albeit balancing criticisms of restrictive covenants to argue for a purportedly less restrictive training repayment regime). Callahan, *supra* note 30, at 715–16, seems to argue that both trade secret law and restrictive covenants promote competition by providing an incentive for spending on research and development, but avoids analyzing whether there is really a separate incentive provided by the enforceability of non-competes above and beyond those provided by trade secret law by moving to the employee training justification.

39. *See* Schulman, *supra* note 30, at 102, 108, 110, 115 (assuming that benefits to employer outweigh limiting employee mobility without asking about effects on innovation and the wider economy, assuming without evidence that employers "more freely" disclose company secrets to employees when there is a non-competition covenant, assuming that the absence of non-competition covenants would deter employers from hiring employees because they will fear trade secret theft; failing to consider whether trade secret law itself reasonably allays such assumed concerns or considering whether employers disclose secrets to employees in California; also assuming without evidence that employers provide "expensive training" when there are such covenants in place).

40. *See* Long, *supra* note 34, at 1303.

41. For an example of this type of contrast, *see* Rubin & Shedd, *supra* note 30, at 97 ("If information were not protected by contract, firms might spend resources in other ways to protect the information," such as segregating employees from learning all aspects of a secret process).

42. *See Outsource Int'l*, 192 F.3d at 170 (Posner, J. dissenting); Schulman, *supra* note 30, at 107–08; Lester, *supra* note 30, at 53; Long, *supra* note 34, at 1309 n.86.

43. *See* Schulman, *supra* note 30, at 107–08 ("Trade secret litigation is difficult and risky, however."; arguing that trade secret misuse is hard to detect, and litigation creates a risk that trade secrets will be disclosed) (citing Edmund W. Kitch, *The Law and Economics of Rights in Valuable Information*, 9 J. LEGAL STUD. 683, 690–91 (1980); Lester, *supra* note 30, at 53 (making the same two arguments and also noting that trade secret law does not always satisfy the employer because information it wants to restrict may not qualify for trade secret protection); Long, *supra* note 34, at 1309 n.86 ("Whereas the [UTSA] merely provides a tort remedy for an employer once trade secret disclosure

These arguments have been repeated in the Law and Economics commentary with a uniformity which suggests rote repetition rather than fresh analysis.

Following from these assumptions—that non-competes protect employer training and are a superior option to trade secret law—some proponents of the Law and Economics approach argue that restrictive covenants should be enforced more often. To that end, they propose that non-compete law should track the requirements of federal antitrust law, thereby allowing courts to find covenants unenforceable only when their operation would be illegal under antitrust law—such as when the employer has an undue amount of market power.[44]

Overall, the Law and Economics theory ignores a stringent intellectual property-based analysis of the non-competition agreement, in order to promote a training-based theory to justify and extend enforceability of the covenants. When we consider the covenants as a form of intellectual property regulation and tease out their implicit hierarchies and policies towards innovation, this will allow us to highlight gaps in the Law and Economics position—gaps discussed in Section IV below.

D. Limitations of the Current Modes of Analysis

Whether commentators criticize or defend the non-compete under these three modes of analysis, few examine the covenants from a detailed intellectual property policy perspective. This is so even though courts use trade secrecy as a primary justification—if not *the*

occurs, a restrictive noncompete ideally prevents disclosure from occurring in the first place. Also, if charges are brought against an employee for breach of trade secret law, the employer risks disclosure of the protected asset in court." (citing Lester)). These arguments appear to have originated in a 1980 article about trade secrecy, which argued that the difficulty in discovering a party's trade secret misappropriation "explains the importance of restrictive covenants." The article also discusses the potential that a trade secret could be disclosed in litigation, but notes the common practice (even in 1980) of attorneys'-eyes-only protective orders—which tends to undermine an argument that trade secret litigation poses a serious risk of disclosure. *See* Kitch, *supra*, at 690–91.

44. *See* Callahan, *supra* note 30, at 713, 716–17 (arguing that restrictive covenants protect trade secrets and an employer's investment in training; asserting that there is no effect on competition unless the employer has "market power" in an antitrust sense, without analyzing whether that analogy is the best one or asking about other forms of anticompetitive effects, such as on innovation); Glick et al., *supra* note 30, at 358–59, 417–18 ("Under this framework, such covenants should not be enforced only when some type of market failure occurs."; proposing that courts limit restrictions on non-competes to narrow contract defenses such as duress and unconscionability and tying the analysis to federal antitrust law).

primary justification—for their enforcement. For that reason, a focus on training seems artificial, and a focus on altering a traditional balancing test may miss the mark by obscuring what really should be the first test: whether the non-compete makes sense as a category of intellectual property regulation.

Not all commentators have ignored the intellectual property angle: in 1984, one article directly argued that non-competition covenants are superfluous because trade secret law already exists to address the problem of trade secret protection.[45] Despite this effort, there appears to have been no subsequent attempt to explore the covenants as intellectual property regulation in order to highlight adverse effect on innovation, information protection, and the like.

This is important. If legislatures are ever to reconsider whether covenants not to compete should be curbed or expanded, it seems best to start with what judges say they are doing when courts enforce them.[46] And although courts assert that they are protecting intellectual property when they enforce non-competes, the case law lacks the rigor and precision seen in patent, copyright, and trade secret cases.[47] The relationship between the parties in non-compete disputes is highlighted at the expense of a precise intellectual property analysis. Courts do not analyze whether the justifications they offer satisfy the policy objections of intellectual property law.

Applying the rigorous scrutiny found in other areas of intellectual property law to non-competition agreements would be a new angle on criticizing the non-compete. An explicit discussion of

45. *See* Closius & Schaffer, *supra* note 13, at 548–49 (arguing that "In applying [restrictive covenant] doctrines, courts fail to perceive that a restriction tailored to prevent misuse of protected information sufficiently safeguards the principal's interests without unnecessarily and unfairly banning the agent from a chosen occupation."; calling such covenants "superfluous" in most cases, except for when "the agent possesses bargaining power equal to that of the principal.").

46. The possibility of legislative change is not hypothetical; one commentary notes that, in 2009, there were potential legislative changes to state non-competition covenant law afoot in three states. *See* John Zabriskie, *Top Ten Developments in Trade Secret and Noncompete Law in 2009*, TRADE SECRET/NONCOMPETE (Jan. 10, 2010), http://www.tradesecretnoncompete.com/top-ten-developments-in-trade-secret-and-noncompete-law-in-2009 (last visited June 1, 2010) (noting that Oregon and Massachusetts considered limitations on restrictive covenants, while Georgia considered strengthening them).

47. It is important to note that while official trade secret law is a much better balanced means of regulating the flow of information than restrictive covenant law, there are nonetheless serious inconsistencies and anomalies in the way trade secret law is theorized and adjudicated. For two contributions to the debate about the nature of trade secret law, *see* Mark R. Lemley, *The Surprising Virtues of Treating Trade Secrets as IP Rights*, 61 STAN. L. REV. 311 (2009); Robert G. Bone, *A New Look at Trade Secret Law: Doctrine in Search of Justification*, 86 CAL. L. REV. 241 (1998).

whether such covenants really promote innovation, much less whether their purported intellectual property protection goal merits the severe restraints placed on departing employees, ought to be front and center in any legislative debate over the legality of restrictive covenants. The same is true for any court willing to seriously consider whether the traditional justifications for enforceability make sense in a given case where the equities favor the departing employee.

To that end, we will now directly examine the implicit policies and hierarchies found in the law of the non-competitive covenant.

IV. The Implicit Intellectual Property Policies of Non-Competition Covenant Law

What would happen if we address the non-competition covenant as a category of intellectual property regulation, and explore its implicit biases and policy objectives? How do the three approaches discussed above fare in light of such a critique? Through the following fifteen points, we will attempt to make explicit many of the unspoken assumptions that underlie the law of the non-compete.

A. Implicit Policies of Innovation and Intellectual Property in Restrictive Covenant Law

1. *It is more important to prevent future trade secret violations by a subset of departing employees than to allow lawful conduct by all departing employees; the entire class of mobile employees will be treated as potential wrongdoers*

The fundamental unspoken premise of the non-competition covenant is that the interests of the entire class of departing employees should be subordinate to employer fears that some of those employees might misuse trade secrets in the future. No matter how many mobile employees would obey the law, their job choices can be restricted because of such speculative concerns—without any empirical evidence of the percentage of departing employees who would misuse trade secrets at the next job.

The restrictive covenant is therefore justified as a deterrent, generally without explicit recognition that the interests of one group are being subordinated to the interests of another. This is in contrast to trade secret law, which requires that an individual misuse (or threaten to misuse) a specific trade secret in order to be restrained.[48]

48. The facts necessary to support injunctive relief on a trade secret claim differ from jurisdiction to jurisdiction, and an "inevitable disclosure"-based trade secret injunction can

Some courts make explicit that there need not be an actual threat to misuse trade secrets in order for a non-compete to be enforceable.[49]

As a form of intellectual property regulation, then, the non-compete implicitly reflects a policy determination that the threat of trade secret misuse is so overwhelming, so pervasive, and so important to prevent that it outweighs the potential social gains obtainted through innovation, and the compensation and job satisfaction of individual employees who freely join or form competing businesses. The implicit structure of the law of employee mobility in states that enforce restrictive covenants is that the non-compete comes first, and trade secret law is merely a supplement to be used either after a non-compete expires or where the former employee misuses a trade secret in a non-competitive market.

2. *The availability of a narrower scheme for trade secret protection should never displace the parallel availability of the broader non-compete; trade secret law should be superfluous except where it enables a former employer to tack on additional violations against a departing employee*

Courts do not limit the enforceability of the non-compete despite the presence of official trade secret law and its more balanced rules. The crude exists side by side with the surgical, and yet courts do not question the parallel availability of two very different means to meet the same goal.

Indeed, to the extent courts examining whether to enforce a restrictive covenant actually discuss official trade secret law, they do so in order to strengthen the former employers' position: under the official trade secret law of some states, the existence of a non-competition covenant can help the employer obtain an "inevitable

be almost identical to the imposition of a restrictive covenant. The Uniform Trade Secrets Act allows injunctive relief upon "actual or threatened misappropriation," but the degree of speculation courts permit in the absence of actual misappropriation generates different results. In California, which prohibits inevitable disclosure injunctions, "threatened" misappropriation is limited to conduct by the defendant that manifestly threatens misappropriation coupled with a showing of imminent harm. *See* FLIR Sys., Inc. v. Parrish, 95 Cal. Rptr. 3d 307, 315–16 (Cal. Ct. App. 2009). In states that permit some form of inevitable disclosure-based injunctive relief, the employer's speculation about overlapping job duties may suffice. *See, e.g.*, Nat'l Starch & Chem. Corp. v. Parker Chem. Corp., 530 A.2d 31, 33 (N.J. Super. Ct. App. Div. 1987) (affirming injunction where employee knew technical secrets for envelope adhesives and would perform the same work as part of his new job for competitor).

49. *See, e.g.*, CertainTeed Corp. v. Williams, 481 F.3d 528, 529–30 (7th Cir. 2007) (a plaintiff need not show that the defendant inevitably will misuse trade secrets in order to have a non-compete enforced).

disclosure" injunction against a recently departed employee.[50] But the converse is not true; there is no tradition in the case law that a departing employee can use the absence of a trade secret violation to block enforcement of the non-compete.

3. Restricting employee competition is so important that courts should also block departing employees from using non-secret information in a given market

Although courts enforcing non-competition covenants frequently do so in order to protect employer trade secrets, such rulings also result in implicit protection of an employer's non-secret information. A departing employee who cannot join a competitor is barred not just from using trade secrets in competition, but also public domain or generally known information that would not qualify for protection under a given state's trade secret laws.

This is distinctly different than trade secret law, which does not permit employers to bar departing employees from using non-secret information.[51] This is also different from federal preemption law regarding state tort and statutory claims that seek to protect non-secret technical information—as in the well-known *Bonito Boats* case and similar decisions.[52]

50. For examples of cases that used the existence of a restrictive covenant as a factor in an "inevitable disclosure" injunction, *see* Ciena Corp. v. Jarrad, 203 F.3d 312 (4th Cir. 2000) (injunction affirmed; enforceable non-competition agreement); Lumex, Inc. v. Highsmith, 919 F. Supp. 624 (E.D.N.Y. 1996) (issuing injunction).

51. *See, e.g.*, Cal. Civ. Code § 3426.1 (West, Westlaw through all 2009 Reg. Sess. laws; all 2009–2010 1st through 5th, 7th, and 8th Extraordinary Sess. laws; urgency legis. through Ch. 711 of the 2010 Reg. Sess.; and all Propositions on 2010 ballots) (defining trade secrecy). Likewise, courts must tailor the terms of trade secret-based injunctions to avoid sweeping in non-secret information. *See, e.g.*, Corning Inc. v. Picvue Elec., Ltd., 365 F.3d 156, 158 (2d Cir. 2004) (remanding where order did not specify what information was subject of the injunction); Am. Red Cross v. Palm Beach Blood Bank, Inc., 143 F.3d 1407, 1412 (11th Cir. 1998) (reversing preliminary injunction in part for non-specific prohibitions on using "any other documents that contain trade secrets that are the proprietary property of Plaintiff."); Roton Barrier, Inc. v. The Stanley Works, 79 F.3d 1112, 1121–22 (Fed. Cir. 1996) (rejecting two post-judgment injunctions for failure to specify exactly what information was barred from use).

52. A number of cases have rejected state tort and statutory claims on federal preemption where plaintiffs sought to protect non-secret technical information. This line of cases stands for the proposition that public domain information cannot be protected under state tort or statutory law—a view in considerable tension with the implicit protection of such information under restrictive covenant law. *See* Bonito Boats, Inc. v. Thunder Craft Boats, Inc., 489 U.S. 141, 157–60 (1989) (voiding state statute that prohibited the use of unpatented, public technology information under the Supremacy Clause); Compco Corp. v. Day-Brite Lighting, Inc., 376 U.S. 234 (1964) (information not covered by a patent could not form basis for state law unfair competition claim); Sears,

In other words, two regimes of law—state trade secret law and federal preemption law—promote the use of non-secret information in innovation and competition. A third—the law of restrictive covenants—goes in the opposite direction, and sweeps the use of non-secret information into its prohibition on individual acts of competition.[53]

Roebuck & Co. v. Stiffel Co., 376 U.S. 225, 228–32 (1964) (same); Confold Pac., Inc. v. Polaris Indus., Inc., 433 F.3d 952, 959–60 (7th Cir. 2006) (unjust enrichment claim based on non-secret product design information preempted; "In general, if information is not a trade secret and is not protected by patent, copyright, or some other body of law that creates a broader intellectual property right than trade secrecy does, anyone is free to use the information without liability."); Ultra-Precision Mfg., Ltd. v. Ford Motor Co., 411 F.3d 1369, 1380 (Fed. Cir. 2005) (same holding as to state law unjust enrichment claim where technology information was not alleged to be a trade secret); Darling v. Standard Alaska Prod. Co., 818 P.2d 677, 680 (Alaska 1991) (same; "Whatever unfairness inheres in allowing the free exploitation of ideas must give way to the greater societal benefit of achieving the full potential of our inventive resources, unless the federal government has granted the protection of a patent."); Joyce v. G.M. Corp., 551 N.E.2d 172, 175 (Ohio 1990) (conversion claim based on non-secret technology ideas rejected at the pleading stage based on U.S. Supreme Court precedents); Daktronics, Inc. v. McAfee, 599 N.W.2d 358, 364 (S.D. 1999) (conversion claim based on non-secret technology concepts rejected; "Since there was no property interest, there could be no conversion."); Sammons & Sons v. Ladd-Fab, Inc., 187 Cal. Rptr. 874 (Ct. App. 1982) (relying on U.S. Supreme Court and other decisions to hold that an unfair competition claim based on defendant's copying of non-secret product designs was preempted by federal law).

53. Federal preemption of state tort and statutory claims that grant intellectual property protection over non-secret technology concepts does not apply to state law contract claims. *See generally* Aronson v. Quick Point Pencil Co., 440 U.S. 257 (1979) (no preemption of contract that allowed party to obtain royalties on information after patent expired). A danger with restrictive covenants, then, is that they allows parties to bypass restrictions found elsewhere in order to control the flow of non-secret information.

At least one commentator has argued in favor of recognizing employer interests—even the possibility of an "ownership interest"—in information an employee learns on the job, whether or not it is a trade secret. *See, e.g.,* Arnow-Richman, *supra* note 12, at 1202–07 (promoting the idea that non-competes allow employers to secure an investment in "employee development, or as enforcing a new 'social' contract of employment that envisions an exchange of training and experience for spot commitments to particular projects and goals."; employers "may have an ownership interest in" employees' "experiential knowledge."). The dangers of this approach cannot be overstated. Theories that promote the implicit recognition of alternative tier of protectable information that is not a trade secret not only undermine official forms of intellectual property that provide for a public domain of information free for all to use, but urge courts to allow employers to restrain employees even where there is no inventive information at stake. The departing employee has no protection even when he or she deliberately avoids misuse of the former employer's trade secrets. The employer has a litigation weapon that is more powerful than a trade secret claim because it does not require the employer to establish the secrecy of precise items of information. Indeed, the former employer seemingly would need only point to even the most general, informal knowledge acquisition on the job. This problem mirrors the debates in recent years regarding UTSA preemption, where trade secret plaintiffs have sought to evade the statutory requirements by alleging alternative tort claims for information claimed to be "confidential but not secret."

The statutes of two states governing non-competition agreements make this policy explicit, by permitting covenants that restrict use of both trade secrets and other information that seemingly is not a trade secret.[54]

4. Preventing future trade secret misuse is so important that employers should not be required to prove that they possess trade secrets, or to assess their value, before using a restrictive covenant to preclude employee competition

There is no formal precondition in restrictive covenant law requiring that an employer prove that trade secrets exist; in fact an employer need not prove that it has created anything of great value. A former employer who owns few trade secrets, or whose secrets have little value, gets to enforce a non-competition contract just like employers that own extensive, secret inventions. There is no test in restrictive covenant law to screen out one from the other.[55] Nor is there a test to prove that the employer has engaged in any significant innovation. Those who do not innovate, or innovate poorly, can obtain the exact same protection as a highly innovative company.

54. *See* FLA. STAT. ANN. § 542.335(1)(b) (West, Westlaw through 2010 2d Reg. Sess. of 21st Legis.) (legitimate business interests can include both "trade secrets" and "valuable confidential business or professional information"); OR. REV. STAT. § 653.295(1)(c)(B) (West, Westlaw through 2010 Spec. Sess. Laws) (employers have a "protectable interest" when, among other things, an employee "[h]as access to competitively sensitive confidential business or professional information that otherwise would not qualify as a trade secret[.]").

55. Closius & Schaffer made a similar point in their 1984 article, *supra* note 13, at 544 ("Unfortunately, courts fail to adequately scrutinize or define the protectable interest of the principal in analyzing such covenants."; arguing that courts weigh the employer's general interest in protecting trade secrets but do not adequately consider "an agent's exposure to customers or possession of unique skills," which should weigh in favor of the employee).

5. *The speed of innovation should be slowed by requiring employees to wait until the expiration of a non-compete before commencing new innovation in a given field. Creating bottlenecks in the diffusion of employee skills to prevent the possibility of trade secret misuse is acceptable*

Restrictive covenants typically last one or two years. Their net effect may be to cordon departing employees into non-competitive positions in other industries; once at a new job, the employee may stay rather than depart once the non-competition clause expires. There appears to be no data on the degree to which mobile employees engage in competitive activities after the expiration of such clauses.

But even if only a small fraction of departing employees delay their entry into competitive positions by a year or two, this still may slow down the pace of overall innovation. Ideas may be generated a year or two after they otherwise would have been. The enforceability of restrictive covenants may thus slow the speed of innovation in a given field.

6. *Courts should take special care to restrict competition by the most highly skilled departing employees; the loss to society is subordinate to the employer's need to avoid talented competition*

In at least some states, courts have held that one policy basis for upholding non-competition covenants is to prevent competition by employees who provide services that are "special or unique."[56] In such jurisdictions, the law of restrictive covenants thus incentivizes courts to prevent the mobility of those most likely to innovate at a new job.

7. *Employers should be able to preclude a departing employee's pursuit of competitive, non-secret ideas even if the employer chooses not to pursue them*

If an employee thinks of a business idea—such as going into a certain market or trying to develop an improved line of products—that high-level idea may not be a trade secret. If the employer is uninterested, the employee may leave to pursue it on his or her own, unless he or she is unable to do so because of a restrictive covenant.

56. *See, e.g.*, Victaulic Co. v. Tieman, 499 F.3d 227, 235 (3rd Cir. 2007) (Pennsylvania law includes unique or extraordinary skills as a legitimate basis for a non-competition covenant); SD Prot., Inc. v. Del Rio, 498 F. Supp. 2d 576, 585 (E.D.N.Y. 2007) (listing provision of special or unique services as one of three grounds for enforcing a non-competition covenants, along with protection of trade secrets and customer information).

The law of the non-competition covenant thus implicitly provides that an employer's decision not to pursue a potentially innovative idea may be sufficient to block the employee from departing to pursue it. The need to enforce the restrictive covenant in such cases would implicitly outweigh potential social gains from innovation in the area not pursued.[57]

B. Implicit Policies of Size and Power in Restrictive Covenant Law

8. *Employers should never be required to demonstrate a need to be protected from employee competition; a party seeking enforcement of a restrictive covenant cannot be too big or too powerful*

Simply put, the employer's need is not analyzed in a non-competition covenant dispute. The most powerful company in a particular city or region can use the courts to stop a single employee from launching a competitive enterprise in his or her garage. The implicit policy is that the need for restrictive covenants is so great that competitive asymmetry, no matter how extreme, should be ignored.[58]

9. *The more fields in which a company operates, and the more employees it has, the greater its ability to singlehandedly limit the development of competitive enterprises in a given city or region*

Larger companies by definition have more employees than smaller companies; larger companies are more likely to work (and innovate) in several different markets. As a result, the businesses whose restrictive covenants cover the most employees, and touch the most markets, will have a disproportionate effect on competition in such markets. A business with a large number of engineers bound by restrictive covenants can take many people off the competitive table for a year or two; a smaller rival with few engineers can have only a small effect. The implicit policy result is that the law allows companies most able to fend off competition to have the greatest local or regional effect on limiting competition.

57. A recent article by Michael Risch also notes this concern. *Comments on Trade Secret Sharing in High Velocity Labor Markets*, 12 EMP. RTS. & EMP. POL'Y J. 339, 346 n.63 (2009), *available at* http://ssrn.com/abstract=1269039 (citing ALAN HYDE, WORKING IN SILICON VALLEY: ECONOMIC AND LEGAL ANALYSIS OF A HIGH VELOCITY LABOR MARKET (2003)).

58. At least one state, Oregon, has a statute that can lead to a different result, at least for employees with lower salaries. There, a 2008 statute makes non-competition covenants unenforceable against employees who make the median income or less for a family of four. OR. REV. STAT § 653.295(1)(d).

10. He who arrives first has the strongest position; temporal priority is more important than relative innovation

The non-competition covenant grants a power to the first-in-time entrant to a given competitive market: that business can restrict those it hires from starting what might be the second or third-in-time competitor. This remains true even if the first-in-time business has been slow to develop new ideas. The implicit policy seems to be that if intellectual property regulation is designed to provide incentives to innovation, rewarding temporal priority, in itself, satisfies that objective.

11. It is so important to protect large companies from competition by departing employees that cases involving such entities should abandon the traditional requirement that non-competition agreements contain geographic limitations

Traditional non-competition covenants usually had geographic limitations, and in small business cases courts today still sometimes reject covenants based on geographical issues.[59] Yet at the same time, the rules differ for large national or international firms: there are no geographic restrictions, and courts will affirm the non-competes used by such companies without geographic limitations.[60] Paradoxically, then, the stronger entities face fewer restrictions on enforcing their non-competes. At some point in the history of non-competition

59. *See, e.g.*, Asheboro Paper & Packaging, Inc. v. Dickinson, 599 F. Supp. 2d 664, 672 (M.D.N.C. 2009) (finding employer unlikely to succeed on enforcing territorial restriction in covenant that covered area in which it did not have an office and did not establish it had customers there); Darugar v. Hodges, 471 S.E.2d 33, 35–36 (Ga. Ct. App. 1996) (holding a covenant against departing physician was unenforceable because the geographic area covered by the contract's statement was larger than the employer's area of business), *overruled by* Chaichimansour v. Pets Are People Too, No. 2, Inc., 485 S.E.2d 248, 250 (Ga. Ct. App. 1997) (disapproving language in *Darugar* "suggesting that prohibitions on competition with respect to customers or potential customers beyond those with whom the employee dealt during his employment will always be unreasonable, even if in a specified and reasonable geographic area.").

60. *See, e.g.*, PrecisionIR Inc. v. Clepper, 693 F. Supp. 2d 286, 292–93 (S.D.N.Y. 2010) (applying Virginia law and enforcing covenant covering the United States and Canada in webcasting services industry); Natsource LLC v. Paribello, 151 F. Supp. 2d 465, 469 (S.D.N.Y. 2001) (nationwide covenant); Intellus Corp. v. Barton, 7 F. Supp. 2d 635, 641–42 (D. Md. 1998) (covenant with no geographic limits enforced where plaintiff "competes for clients on a national, if not global basis"); Branson Ultrasonics Corp. v. Stratman, 921 F. Supp. 909, 913 (D. Conn. 1996) (affirming covenant where company engaged in "international marketing activities"); Superior Consulting Co., Inc. v. Walling, 851 F. Supp. 839, 847 (E.D. Mich. 1994) (plaintiff "does business in forty-three states and a number of foreign countries. The unlimited geographic scope of the non-competition provision here was therefore not unreasonable.").

covenant law, large companies convinced courts that geographic restrictions should be lifted. Perhaps attorneys representing departing employees in such cases lacked the power or resources to argue that the opposite should be true: the larger the company, the less threat it faces from a departing individual.

The implicit policy result is that the biggest global companies have the same footing to stop a start-up founded by a former employee as the smallest local companies.

C. Implicit Policies of Markets and Economics

12. There ought to be fewer competitive entrants in a given field of innovation

The enforceability of non-competition covenants likely reduces new market entrants, because departing employees who might otherwise form new, competitive companies must do something else instead. Although there is no empirical means to measure the number of start-up enterprises that might otherwise be formed in the absence of the non-compete, it seems reasonable to assume that non-competes lead to the formation of fewer such companies. The implicit policy seems to be that a departing employee seeking to form a new enterprise must not do so in the area in which their skills are most developed.

13. Customers in a given market ought to have fewer choices; employers should be able to reduce their customers' options by using restrictive covenants

When customers sign up with a business that uses non-competes, they lose the ability to purchase goods or services from employees who might offer a better personal relationship, price, or product. The implicit policy of the law of restrictive covenants is that their interests are subordinate to those of the companies using the non-competes.[61]

61. As Bishara poses the question, *supra* note 19, at 288, "[W]hy did two entrepreneurs in Seattle get sued when they tried to open a new business, started in a parent's basement, to make it easier for small companies to meet their postal needs at the most competitive price," especially if they "provided a better, more economical service[?]" (commenting on a lawsuit brought by Pitney-Bowes against former employees).

14. A temporary local monopoly over potential competition is preferable to allowing competition by departing employees

If the only potential market entrants are former employees, a temporary monopoly is permissible, and implicitly preferable to competition by such individuals.

D. The Rhetoric of the Restrictive Covenant and its Reality

15. Courts should engage in expressions of judicial hostility to restrictive covenants only then to frequently affirm them; judicial language should operate to soften the blow figuratively, but not literally

One of the curious aspects of non-compete litigation is the gap between seemingly dramatic expressions of judicial opposition to restrictive covenants and the general enforceability of such covenants. Courts often preface a ruling on a non-compete with a statement that such covenants are disfavored, and have a negative effect on employees.[62] Apart from prior restraints, perhaps no other area of civil law so often invokes explicit statements of disfavor. Certainly there is no similar tradition in trade secret or other areas of intellectual property law.

The holdings in such cases, however, do not always match their rhetoric: non-competes are, of course, quite often enforced. The rhetoric of the restrictive covenant, then, seems to operate not as a literal statement of the law, but rather as a step by which the court ritually cleanses itself of the unsavory power imbalance and unfairness inherent in non-competition contracts by disavowing them. The implicit policy is that figurative language should be divorced from substantive results.

V. Applying the Intellectual Property-Based Critique of the Non-Competition Covenant

We have reviewed, in blunt fashion, the policies that underlie the non-competition covenant but usually go unspoken. We have seen

62. *See, e.g.*, Victaulic Co. v. Tieman, 499 F.3d 227, 235 (3rd Cir. 2007) (reciting that Pennsylvania law disfavors non-competition covenants, but then stating immediately afterwards that an acceptable covenant need only "be tailored to protect legitimate interests."; reversing and remanding a ruling against a restrictive covenant for further fact-finding); *SD Protection, Inc.*, 498 F. Supp. 2d at 585 (asserting that New York courts strictly construe non-competition covenants because they conflict with policies favoring competition and also harm employee's abilities to earn a livelihood, but refusing to find covenant unenforceable on a motion to dismiss in case involving company providing chaperones for schoolchildren).

that the restrictive covenant, as a category of intellectual property law, fails to distinguish between wrongdoers and those who obey the trade secret laws, fails to distinguish between secret and non-secret information, and gives rise to a host of disincentives to innovation.

With this analysis in mind, we can now return to the three most common schools of thought regarding the non-competition agreement, and ask what the intellectual property analysis adds to the debate—and whether it highlights contradictions, strengths, or weaknesses in current approaches.

A. Supplementing the Balancing Approach and the Regional Economy Approach

Treating the non-competition covenant as a category of intellectual property regulation—and thus taking courts seriously when they assert that enforcing such covenants is about trade secret protection—can provide a useful new angle for commentators critical of restrictive covenants. Whether one proposes that the "legitimate interests" balancing test be modified, that restrictive covenants be curtailed for certain professions, or that they be curtailed to promote regional innovation clusters, a focus on the failure of the non-compete as a balanced form of intellectual property regulation can sharpen the analysis.

In the first place, any argument in favor of limiting the enforceability of restrictive covenants is strengthened when we consider that there is a much better balanced means to address the question of trade secret protection—namely, official trade secret law. No party will lose its ability to allege and prove a trade secret violation if non-competition covenants are enforced less often, abolished for doctors or journalists, or prohibited. What is lost is the former employer's ability to protect non-secret information, restrict employees who have done nothing wrong, and restrict employees in the absence of any valid trade secrets.

Second, focusing on how the restrictive covenant creates a legal regime that is not tailored to specific items of intellectual property, and to specific acts by former employees, helps those promoting a regional economy-based critique of the restrictive covenant provide a more specific account of its shortcomings for innovation policy. Highlighting the restraints imposed on productive employees and their lost contributions by a legal regime that allows employers to treat all departing employers as wrongdoers helps us understand specifically what regional economies lose when they enforce non-competition contracts. In addition, we can provide a more precise account of how non-competition agreements inhibit regional innovation by making explicit their favoritism towards already-established companies, local monopolies, and the greater anticompetitive reach of larger companies.

By emphasizing that restrictive covenants both narrow the public domain of information freely available for use and also retard the growth of new technology ventures, an intellectual property-based focus on the covenant can also bring together two strands of theory that might profit from cross-pollination. Specifically, advocates of a broad informational public domain—who usually write from a copyright- or Internet-centered perspective—might make common cause with those who analyze regional innovation. Doing so could better highlight problems with non-competition covenants, and also link those problems to debates seen in other areas of intellectual property law.[63]

B. Exposing Flaws in the Law and Economics Approach

1. Problems with the Focus on Employee Training

Reviewing the implicit policies of the restrictive covenant and contrasting its efficacy with trade secret law helps highlight problems in the Law and Economics-based approach to such covenants.

The first problem for the Law and Economics approach is that if the case law tells us that trade secrecy is the ground on which courts most commonly justify the non-compete, we should be discussing whether that makes sense, rather than making assumptions about the value of employee training. The focus on job training diverts attention from what should be the first order of analysis.

The absence of detailed intellectual property analysis is more glaring when we consider that courts rarely address or justify non-competes on job training grounds.[64] Cases that enforce non-competes

63. For two contributions to public domain theorizing, *see* Pamela Samuelson, *Enriching Discourse on Public Domains*, 55 DUKE L.J. 783 (2006); James Boyle, *The Second Enclosure Movement*, 66 LAW & CONTEMP. PROB. 33 (2003).

64. Only the rare case takes employee training into account when determining the validity and scope of a non-competition covenant. *See, e.g.*, 7's Ent., Inc. v. Del Rosario, 143 P.3d 23, 32 (Haw. 2006) (employer's provision of training as well as "confidential" information to low-level travel industry employee justified three-year non-competition covenant for the Honolulu area). It should also be noted that Colorado has a unique statute governing non-competition covenants which, among other things, permits such covenants "for recovery of the expense of educating and training an employee who has served an employer for a period of less than two years." *See* COLO. REV. STAT. § 8-2-113 (2010).

on training-based rationales alone are uncommon, as are cases where courts also cite protection of confidential information as a rationale along with training. Even in Florida, a state that lists "extraordinary or special training" among statutory grounds for affirming a restrictive covenant, cases using such training as a rationale to enforce restrictive covenants appear to be rare.[65] Around the country, cases affirming non-competition covenants on training grounds—or even delving into training-based arguments—are unusual.[66]

All the same, commentators often assume, without supplying evidence, that employers who use non-competes provide meaningful training, that the employees to be restrained require such training, and that employers are not already compensated for any training provided through increased profits.[67] This line of thinking is so pervasive that even those critical of the non-compete sometimes appear to accept it.[68] The articles in this area do not recognize the

65. *See* FLA. STAT. ANN. S § 542.335(1)(b)(5) (2010); Frank J. Cavico, *'Extraordinary or Specialized Training' as a 'Legitimate Business Interest' in Restrictive Covenant Employment Law: Florida and National Perspectives*, 14 ST. THOMAS L. REV. 53, 65–72 (2001) (reviewing five Florida cases involving employee training arguments, where three rejected the argument).

66. *See* Cavico, *supra* note 65, at 72–97 (extensive review of nationwide case law on the question, including cases where confidential information was also a factor; total number of cases cited is a tiny fraction of reported non-competition covenant cases reported during the same time period, and reporting only two non-Florida cases that affirmed a restrictive covenant solely on training grounds); Long, *supra* note 34, at 1311 ("However, courts have historically disfavored covenants designed solely to protect an employer's investment in training." (citing the absence of training-based cases in Peter J. Whitmore, *A Statistical Analysis of Noncompetition Clauses in Employment Contracts*, 15 J. CORP. L. 483, 524–25 & n.243 (1990))); Lester, *supra* note 30, at 57–58 ("Courts have been exceedingly reluctant to protect employer investments in training per se."; (citing reluctance even in Florida, Louisiana, and Colorado, where statutes allow enforceability for training in certain instances)); Sterk, *supra* note 30, at 405 ("The employer's investment in training has generally furnished a basis for enjoining competition only in those cases where the employer has shared trade secrets or customer lists with the employee.").

67. *See* Sterk, *supra* note 30; Long, *supra* note 34, at 1298–99 (describing the "importance of protecting an employer's investment in training," by arguing that an economy increasingly based on high-skill technology jobs means that formal job training is or will be provided in such jobs).

68. Even commentators critical of a wholesale Law and Economics approach seem sometimes to accept the theory that restrictive covenants incentivize training. *See, e.g.*, Bishara, *supra* note 19, at 318 ("Without noncompete enforcement there is a greater likelihood that a worker will leave to work for a competitor or to start a competing enterprise before the investment in human capital is recouped by the employer."). Some, however, would require that the employer provide some evidence of "the promise of job-related training or opportunities for skills development." *See, e.g.*, Arnow-Richman, *supra* note 12, at 1240–41.

possibility that increasingly contingent, short-term employment patterns leave employees "more responsible for their own training and benefits."[69] Perhaps even more striking, commentators advocating the training theory do not discuss California law, which is seemingly an enormous problem for that approach. California law prohibits restrictive covenants against departing employees, but companies there nonetheless have not stopped innovating. There is no evidence that California companies have suffered a special disincentive to hire because non-competes are unenforceable, whether or not such employers provide any job training.

At a minimum, the intellectual property-based critique of the restrictive covenant introduces new variables on the other side of the ledger, and thus a rote citation to employer training alone should no longer suffice to justify the non-competition agreement.

Some commentators do recognize limits to the training theory—noting that not all training is valuable to the subsequent employer, thus limiting the concept that the first employer funds training used by later employers—but still argue for general enforcement of restrictive covenants.[70] And, to be sure, some influenced by the Law and Economics-inflected tradition recognize problems with restrictive covenants, including their potential effects on regional innovation, and would favor limiting them even if empirical evidence supported the training hypothesis.[71] But we need to go further, and ask whether

69. *See* Dau-Schmidt, *supra* note 24, at 848 (noting general negative effects of labor market acceleration on American employees, with the possible exception of technology- and knowledge-based employment; "Why would an employer retrain employees whose skills have become obsolete when the average tenure at a firm is only a few years?"); *see also* Lester, *supra* note 30, at 50 ("In recent years, however, as we have witnessed a decline of job stability and increasing mobility of labor, firms' traditional incentives for providing training may have waned."). This is especially true in the current recession, where there is a glut of unemployed job seekers. Employers seemingly can choose applicants who already possess the requisite skills and training over those who do not.

70. *See* Posner & Triantis, *supra* note 37, at 5 (noting that some forms of training may be "valuable to some other employers but not all," and generally advocating enforcement of restrictive covenants where end-of-term renegotiation was costly or impossible, and where training is of the type more likely to be valuable to the subsequent employer).

71. *See* Lester, *supra* note 30, at 74–75 (noting strength of regional economy-based critique of the non-compete and noting the possibility that employers have less incentive to provide training in an economy of higher mobility; proposing that if empirical evidence showed that there is "a nontrivial subclass of situations where employers would inefficiently underinvest in their employees absent some form of protection," there could be a "hybrid approach" where restrictive covenants are prohibited, but training repayment of liquidated damages clauses could be permitted).

intellectual property concerns should take precedent over hypothetical models based on assumptions of training.[72]

2. *Problems with the Dismissal of Official Trade Secret Law*

When we focus on intellectual property concerns, the glib arguments made by Law and Economics proponents to dismiss the more balanced alternative presented by official trade secret law are underwhelming, and even misleading.

As described above, Law and Economics commentators argue that trade secret law is difficult to enforce, because the employer must detect wrongdoing, show up in court, and prove trade secrecy.[73] On that ground, they argue, non-competition covenants are superior because they eliminate the necessity for such efforts by the employer. Judge Posner provided perhaps the clearest expression of this policy preference in a dissenting opinion advocating wider use of non-competes:

> Such clauses are difficult to enforce, however, as it is often difficult to determine whether the former employer is using his former employer's trade secrets or using either ideas of his own invention or ideas that are in the public domain. [citations]. A covenant not to compete is easier to enforce, [citation], and to the extent enforced prevents the employee, during the time and within the geographical scope of the covenant, from using his former employer's trade secrets.[74]

Such accounts provide no explanation for why easing the burden on the employer is, in itself, a sufficient ground to favor a non-compete over the application of trade secret law. The implication

72. A related issue is how long a restrictive covenant should last if it is premised on the employer's (supposed) provision of training. Many commentators who advocate for enforcement of non-competition agreements on training grounds do so in broad brush terms, and do not address what period of time a departing employee should be sidelined as a consequence of receiving training that could vary in time, type, and rigor. One writer proposes a software tracking system to keep track of profits derived from employment training for purposes of an employee repayment scheme. *See* Long, *supra* note 34, at 1317–19 (making the questionable assumption that "[b]efore investing in training, employers undoubtedly will have performed a cost-benefit analysis to asset the profit potential from such an investment."). The idea is unrealistic, not least because one would have to develop a sufficiently fair and precise methodology for determining what portion of profits are attributable to training a particular employee received.

73. *See* Callahan, *supra* note 30, at 713, 716–17; Glick et al., *supra* note 30, at 358–59, 417–18.

74. *See Outsource Int'l*, 192 F.3d at 170 (Posner, J. dissenting).

seems to be that the former employer is always honest and seeks only the legitimate protection of trade secrets, and the law thus should remove any obstacles—such as having to prove that secrets really exist—to further the employer's interests. At a minimum, such commentators seem unaware that trade secret plaintiffs all too often make claims over non-secret information, and sometimes have less than salutary motives. The case law on awards to defendants for "bad faith" tactics offers perhaps the strongest evidence.[75]

Worse, some even seem to suggest that non-competition clauses should be enforced because they allow employers to protect *non-secret information* from use by departing employees—in sharp contrast to the rules of official trade secret law, and without providing any justification or policy reason for that result. For example, one writer stated that "because the [trade secret] statute does not fully protect the employer from disclosure, further protection, in the form of restrictive covenants, is needed."[76] Another, seeming to suggest that employers should forgo official trade secret route because it may protect less information that restrictive covenant, offered that "an employer may be uncertain as to whether valuable information will satisfy the definition of a trade secret for purposes of legal protection."[77] Yet another promotes the non-compete as a means to stop "the free flow of information" without noting any distinction between secret and non-secret information.[78]

These theories come up short when we consider the imbalances and implicit hierarchies in the law of restrictive covenants discussed above. What is the policy basis, for example, for allowing former employers to protect non-secret information through restrictive

75. *See, e.g.*, Degussa Admixtures, Inc. v. Burnett, 471 F. Supp. 2d 848, 857 (W.D. Mich. 2007) (awarding sanctions to defendant former employees for bad faith trade secret claims); Berry v. Hawaii Express Serv., Inc., 2007 WL 689474, *13–15 (D. Haw. March 2, 2007) (same); FLIR Sys., Inc. v. Parrish, 95 Cal. Rptr. 3rd 307, 313 (Cal. Ct. App. 2009) (same); *see also* Brooks Automation, Inc. v. Blueshift Tech., Inc., 20 Mass. L. Rptr. 541, 2006 WL 307948, *5–11 (Mass. Super. Ct. 2006) (damages awarded to former trade secret defendant in tortious interference suit following a "frivolous" trade secret lawsuit).

76. *See* Long, *supra* note 34, at 1309 (citing Lester, *supra* note 30, at 53).

77. *See* Lester, *supra* note 30, at 53 ("Restrictive covenants, then, fill a gap where other legal and extra-legal mechanisms fall short. Ideally, a contract enables the employer to keep former employee away from competitors (or direct competition) in the first place.").

78. *See* Callahan, *supra* note 30, at 707 ("While competition by way of product imitation and improvement requires the free flow of information, an unlimited flow of information would allow imitators to share in the benefits from information without incurring the costs necessary to produce the information.").

covenants that are unprotected under trade secret law? With the weaknesses in the training theory, what justifies allowing restraints on employees who do not engage in wrongdoing? And why should the opportunities for innovation be reduced in the absence of such wrongdoing?

There seems to be no valid reason for a legal regime to exempt the employer from proving both that it has trade secrets and that they have been misused in order to restrain a former employee, or to allow blanket prohibitions on all persons and all information in the absence of proving secrecy and misuse. From the Law and Economics-based commentary, however, the reader would be largely unaware that there are any interests to balance against those of former employers.

The disparagement of relying on trade secret law instead of enforcing restrictive covenants because secrets supposedly will leak out during litigation is equally unconvincing.[79] No one has offered evidence to support this assertion. In fact, protective orders are ubiquitous in trade secret litigation, and statutes call upon courts to protect "an alleged trade secret" from disclosure.[80] In the very rare instances where a party accidentally discloses an alleged secret during a litigation, courts are forgiving and will not rule that the plaintiff has lost the right to protect that information unless the plaintiff has been unusually careless.[81] This makes the Law and Economics-based

79. *See* Callahan, *supra* note 30, at 713, 716–17; Glick et al., *supra* note 30, at 358–59, 417–18.

80. *See, e.g.*, Cal. Civ. Code § 3426.5 (Deering 2010) (UTSA provision requiring that "a court shall preserve the secrecy of an alleged trade secret by reasonable means, which may include granting protective orders in connection with discovery proceedings, holding in-camera hearings, sealing the records of the action, and ordering any person involved in the litigation not to disclose an alleged trade secret without prior court approval."); Pooley, *supra* note 1, at §§ 4.04[3], 12.02 (noting that UTSA provision is mandatory. "[I]t has long been recognized that civil trials in trade secret cases must be conducted at least in part in a closed courtroom, in order not to destroy the very property right which is at issue.").

81. *See, e.g.*, Hoechst Diafoil Co. v. Nan Ya Plastics Corp., 174 F.3d 411, 418 (4th Cir. 1999) ("[C]ourts addressing this fact-intensive issue have regarded the unsealed filing of a document as a single non-dispositive factor to be weighed in determining whether the document's contents remain a trade secret." Mistaken public court filing in and of itself did not destroy trade secrecy.); Gates Rubber Co. v. Bando Chem. Indus., Ltd., 9 F.3d 823, 849 (10th Cir. 1993) (party's inadvertent disclosure and failure to seal information excused where there was no evidence any third party had accessed the information); Wallis v. PHL Assoc., Inc., 86 Cal. Rptr. 3rd 297, 303 (Cal. Ct. App. 2008) (court's sealing mistake did not alter trade secret status, despite defendant's violation of the protective order by attempting to engineer a third party's access to the information); Bobrow v. Bobrow, 810 N.E.2d 726, 734 (Ind. Ct. App. 2004) (permissible to seal after delay that was not unreasonable); *but see* Awards.com, LLC v. Kinko's, 834 N.Y.S.2d 147, 156 (N.Y. Ct. App.

argument favoring restrictive covenants over trade secret law seem like it was created without sufficient analysis.

In short, these often-repeated justifications for the non-compete over trade secret law are unconvincing. Worse, they fail to acknowledge the growing sophistication of trade secret law, and appear to have originated instead from a single, thirty-year-old law review article. To the extent the proponents of the Law and Economics approach propose that the restrictive covenant is the best means to regulate intellectual property governed by state law, they fail to address the important policy concerns discussed above, and fail to adequately explain why trade secret law is a suboptimal alternative. Faced with a rigorous critique of the non-compete as a form of intellectual property law, and the more calibrated balancing offered by trade secret law, we should be skeptical of the Law and Economics-inflected justifications for the restrictive covenant over trade secret law.[82]

Overall, treating the restrictive covenant as a category of intellectual property regulation—and recognizing its implicit power imbalances, biases, and one-sided overprotection—helps highlight problems in Law and Economics theories about competition by departing employees. At a minimum, identifying these problems calls the Law and Economics-based promotion of restrictive covenants into question and demands a more exacting defense of why commentators in this camp believe that non-competition clauses should be robustly enforced, and why the alternative offered by trade secret law should be downplayed.

C. Potential Drawbacks to an Intellectual Property Critique

It is important to consider potential drawbacks to an intellectual property-based critique of the restrictive covenant—though there appear to be none which detract significantly from the analysis presented in this essay.

2007) (party waived trade secret protection by twice failing to file document under seal); Religious Tech. Ctr. v. Lerma, 897 F. Supp. 260, 266 (E.D. Va. 1995) (denying injunctive relief on a trade secret claim where the defendant obtained information from another case during a long period when its file was unsealed).

82. The same is true for the proposals by some in the Law and Economics camp, discussed *supra* Section III.C, that non-competition covenants should be enforced absent extreme conditions such as duress or antitrust-like market power. Such proposals take no notice of the many problems with the non-competition covenant, and would result in practice in severe restraints on employee mobility around the country.

First, one must wonder whether a rejection of the non-competition covenant in favor of official trade secret law in a particular jurisdiction would result in more trade secret lawsuits and, if so, whether the costs to employers and the court system are justifiable. There is probably no way to empirically assess this possibility. One would have to subtract the number of lawsuits over non-competition covenants that would no longer be filed, and substitute in their place an unknown number of trade secret lawsuits. California, for example, prohibits restrictive covenants and also has many trade secret lawsuits, but that may only reflect a high concentration of technology enterprises. The overall number of lawsuits might well be lower if restrictive covenants were unenforceable because employers would have to file colorable allegations and then establish a claim.

In any event, there seems to be no strong policy reason to be concerned that, in the absence of restrictive covenants, former employers would have to spend money to prove wrongdoing to succeed in trade secret litigation against a former employee. Avoiding costs is good policy only if the cost-avoidance measure does not cause greater problems for other relevant actors, or for other affected parties outside the litigation. Specifically, the costs to departing employees who lose job opportunities, to new employers who lose innovative, skilled employees, and to the wider society which benefits from innovation seem to provide a more than adequate rebuttal to the Law and Economics-based concern about imposing litigation costs and burdens of proof on employers. Again, the significant number of trade secret plaintiffs who fail to establish their cases or who are sanctioned for pursuing accusations without merit, tells us that we cannot assume that all employers act in good faith against departing employees.

Second, we might ask whether a potential plaintiff's inability to detect trade secret misappropriation—for example, when the ideas concern manufacturing techniques hidden inside company walls—justifies the use of restrictive covenants to rule out the possibility of misappropriation by departing employees who would otherwise join competitors. The precise question is whether the difficulty in detecting wrongdoing for some types of trade secrets, in an unknown number of cases, justifies a legal regime that allows restrictions on all departing employees, without a showing of wrongdoing, and without a showing that trade secrets exist in the first place. Put differently, do we accept an unquantifiable increase in the possibility of less detectable forms of trade secret misappropriation in exchange for employees' greater ability to take new jobs of their choosing, and for the probability of a resulting increase in innovation? The certain benefits of the latter appear to outweigh the speculative nature of the former.

Third, we should consider potential collateral benefits of restrictive covenants. For example, if non-competition agreements force employees to move into different markets and different fields, does that create any benefits for the employees, or for their regional economies, which outweigh the benefits of prohibiting restrictive covenants? There appears to be no empirical research on the effect of dispersing employee skills and knowledge into fields that differ from their former employment. In the absence of such data, the benefits from ending the enforceability of restrictive covenants seem the better policy choice.

Finally, we should consider whether employers who use restrictive covenants pay similarly-situated employees more, or otherwise disproportionately provide significant benefits to the employee. Again, there appears to be no empirical research on this question. That employers and not employees favor restrictive covenants may provide anecdotal evidence that the advantages are one-sided. In the absence of evidence suggesting that employees gain more from the enforceability of restrictive covenants than otherwise, speculation about such benefits seems to be outweighed by the likely increase in innovation were such covenants are unenforceable.

V. Conclusion

Although the commentary on non-competition covenants is vast, very little of it examines such covenants as a category of intellectual property regulation. This is surprising, not just because courts so often justify restrictive covenants on trade secrecy grounds, but also because commentators who offer alternative grounds for analyzing such covenants concede that this is what courts do.

Viewing the law of restrictive covenants as a type of intellectual property regulation brings to light a number of implicit policies and biases. These policies and biases are inconsistent with the goals of intellectual property law: to incentivize innovation without promoting monopoly enterprises, to promote a broad public domain of creative information alongside well-identified categories of protected information, and to balance the interests of rights-holders with those affected by the exercise of their powers (here, departing employees).

An intellectual property focus thus helps us highlight policy flaws in the enforceability of restrictive covenants—as well as flaws in the Law and Economics perspective that advocates their continued use. At the same time, this analysis can be a useful supplement to the critique of the non-compete under a balancing test approach or the regional economy approach. Most important, it can provide specific tools to state legislatures examining the continued enforceability of such covenants, and to litigants and judges interested in developing policy rationales for limiting their scope in particular cases.

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Non-Compete Agreements: Analysis of the Usage, Potential Issues, and State Responses

May 2016

THE WHITE HOUSE
WASHINGTON

The U.S. economy has experienced a historic turnaround since the depths of the Great Recession. The unemployment rate has fallen by half since its peak in 2009, and over the last six years, American businesses have created more than 14 million new jobs, the longest streak on record. Despite this remarkable progress, the U.S. economy faces a number of longer-run challenges, some of which go back several decades. In at least part of the economy, evidence suggests that competition for consumers and workers is declining, and the number of new firms each year is experiencing a downward trend. In addition to this trend, there has been a decrease in 'business dynamism'—the so-called churn of firms and who is working for whom in the labor market—since the 1970s.

One factor driving these issues may be institutional changes in labor markets, such as greater restrictions on a worker's ability to move between jobs. To address these and other issues that limit competition in the marketplace, the President has directed executive departments and agencies to propose new ways of promoting competition and providing consumers and workers with information they need to make informed choices, in an effort to improve competitive markets and empower consumers' and workers' voices across the country.

Building on these efforts, this document provides a starting place for further investigation of the problematic usage of one institutional factor that has the potential to hold back wages—non-compete agreements. These agreements currently impact nearly a fifth of U.S. workers, including a large number of low-wage workers. This brief delineates issues regarding misuse of non-compete agreements and describes a sampling of state laws and legislation to address the potentially high costs of unnecessary non-competes to workers and the economy. It draws on a recently released report from the U.S. Treasury Office of Economic Policy--*Non-Compete Contracts: Economic Effects and Policy Implications*—which provides an overview of the nascent research on non-competes' prevalence, enforcement, and effects.

Introduction

Non-compete agreements, or "non-competes," are contracts that ban workers at a certain company from going to work for a competing employer within a certain period of time after leaving a job. The main rationale for these agreements is to encourage innovation by preventing workers with 'trade secrets' from transferring technical and intellectual property of companies to rival firms, even when there are trade secret laws to protect companies. These agreements may also encourage greater employer investments in worker training because they may reduce fear that workers will take skills gained to a competitor.

Workers' value comes in part from the skills and experiences gained on the job. Non-competes can reduce workers' ability to use job switching or the threat of job switching to negotiate for better conditions and higher wages, reflecting their value to employers. Furthermore, non-competes could result in unemployment if workers must leave a job and are unable to find a new job that meets the requirements of their non-compete contract.

In addition to reducing job mobility and worker bargaining power, non-competes can negatively impact other companies by constricting the labor pool from which to hire. Non-competes may also prevent workers from launching new companies. Some critics also argue that non-competes can actually stifle innovation by reducing the diffusion of skills and ideas between companies within a region, which can in turn impact economic growth. Non-compete agreements may also have a detrimental effect on consumer well-being by restricting consumer choice.

Research suggests that 18 percent, or 30 million, American workers are currently covered by non-compete agreements. Even more workers, roughly 37 percent, report having worked under a non-compete agreement at some point during their career. A 2013 study commissioned by the Wall Street Journal signals either a rise in the prevalence of non-competes, or significant growth in their enforcement. The law firm Beck Reed Riden LLP found a 61 percent rise from 2002 to 2013 in the number of employees getting sued by former companies for breach of non-compete agreements.[1]

Non-compete clauses are found not only in the contracts of senior executives or other highly compensated employees, but also for comparatively low-skill occupations. Approximately 15 percent of workers without a college degree are currently subject to non-compete agreements, and 14 percent of individuals earning less than $40,000 are subject to them. Recent media coverage has raised awareness of the usage and enforcement of non-competes among low-wage occupations including fast-food employees, warehouse workers, and camp counselors.

Based on the impacts of unnecessary non-competes for workers, consumers, and the broader economy, several states have passed, and many others are currently weighing reforms to the ways non-compete agreements are regulated. Federal legislation has also been proposed to limit the use of non-compete agreements in low-wage fields where they are less likely to have valid uses. Continued state interest and a growing understanding of the prevalence of non-compete agreements suggest that the time is ripe to consider how government can best ensure these agreements are used appropriately.

In the large majority of states, non-compete agreements are enforceable for workers across all income brackets, and many states do not have restrictions around the geographic or temporal limitations of non-competes. Non-compete agreements are also prevalent in states where the courts generally do not enforce them. For example, in California, which does not generally enforce non-compete agreements, 22 percent of workers report that they have signed a non-compete. Survey research shows that many workers are not aware of the lack of enforcement in these states, suggesting that even unenforced non-compete agreements may have deleterious effects.

In the coming months, as part of the Administration's efforts to support competition in consumer product and labor markets, the White House, Treasury, and the Department of Labor will convene a group of experts in labor law, economics, government and business to facilitate discussion on non-compete agreements and their consequences. The goal will be to identify key areas where implementation and enforcement of non-competes may present issues, to examine promising practices in states, and put forward a set of best practices and call to action for state reform. By facilitating a dialogue between academic experts and those with practical expertise, we aim to identify policies that could be used to promote a fair and dynamic labor market, while remaining cognizant of real world challenges to reform. We also aim to prompt further research exploring the use and the effects of non-compete agreements.

[1] Wall Street Journal. "Litigation Over Noncompete Clauses Is Rising."
http://www.wsj.com/articles/SB10001424127887323446404579011501388418552

Summary of US Treasury Department Report on Non-Compete Contracts Prevalence and Economic Effects

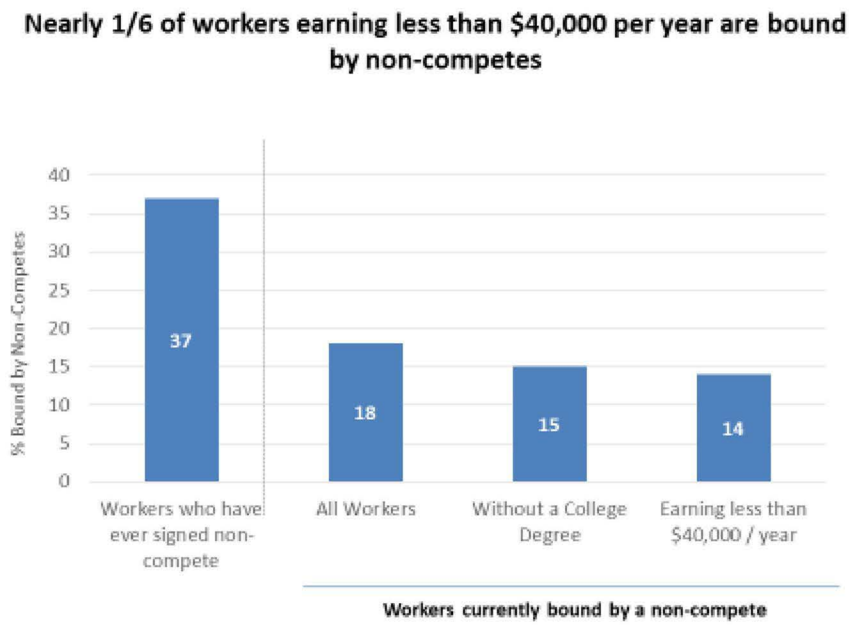
Use and Misuse of Non-Compete Contracts

The main economically and societally beneficial uses of non-competes are to protect trade secrets, which can promote innovation, and to incentivize employers to invest in worker training because of reduced probability of exit from the firm.

However, evidence indicates that non-competes are also being used in instances where the benefit is likely to be low (e.g., where workers report they do not have trade secrets), but the cost is still high to the worker. For example:

- Only 24 percent of workers report that they possess trade secrets. Moreover, fewer than half of workers who have non-competes report possessing trade secrets, suggesting that trade secrets do not explain the majority of non-compete activity.[2]
- If protection of trade secrets were the main explanation for non-compete agreements, then one would expect such agreements to be highly concentrated among workers with advanced education and occupations entrusted with trade secrets. However, 15 percent of workers without a four-year college degree are subject to non-competes, and 14 percent of workers earning less than $40,000 have non-competes. This is true even though workers without four-year degrees are half as likely to possess trade secrets as those with four-year degrees, and workers earning less than $40,000 possess trade secrets at less than half the rate of their higher-earning counterparts.[3]
- While engineering and computer/mathematical occupations have the highest non-compete prevalence at slightly more than one-third, occupations like personal services and installation and repair also include many workers with non-competes, at about 18 percent.

[2] US Treasury Department, "Non-compete Contracts: Economic Effects and Policy Implications", March 2016.
[3] Starr, Evan, Norman Bishara and JJ Prescott. 2015. "Noncompetes in the U.S. Labor Force."



When entry-level workers in low-wage jobs are asked to sign two-year non-competes, the distributional impacts are particularly concerning.[4] Non-competes can also become overly burdensome when they apply too broadly in terms of geography or time. Without restricting non-competes to only apply in a specific region, or for a limited time period, job-seekers may be forced to leave their industry in order to make a living in a way that does not conflict with their non-compete agreement.

In addition, regardless of whether they promote the protection of trade secrets, the agreements can sometimes be implemented in ways that create confusion or lack of transparency for workers.

- Many workers do not realize when they accept a job that they have signed a non-compete, or they do not understand its implications.
- Many workers are asked to sign a non-compete only after accepting a job offer. One lower-bound estimate is that 37 percent of workers are in this position.
- Many firms ask workers to sign non-competes that are entirely or partly unenforceable in certain jurisdictions, suggesting that firms may be relying on a lack of worker knowledge. For instance, California workers are bound by non-competes at a rate slightly higher than the national average (19 percent) despite the fact that, with limited exceptions, non-competes are not enforced in that state.

Evidence on the Effects of Non-Compete Contracts

Although non-competes can play a beneficial role when used in a limited way, evidence suggests that in certain cases, non-competes can reduce the welfare of workers and hamper the efficiency of the economy as a whole by depressing wages, limiting mobility, and inhibiting innovation.

[4] US Treasury Department, see 1.

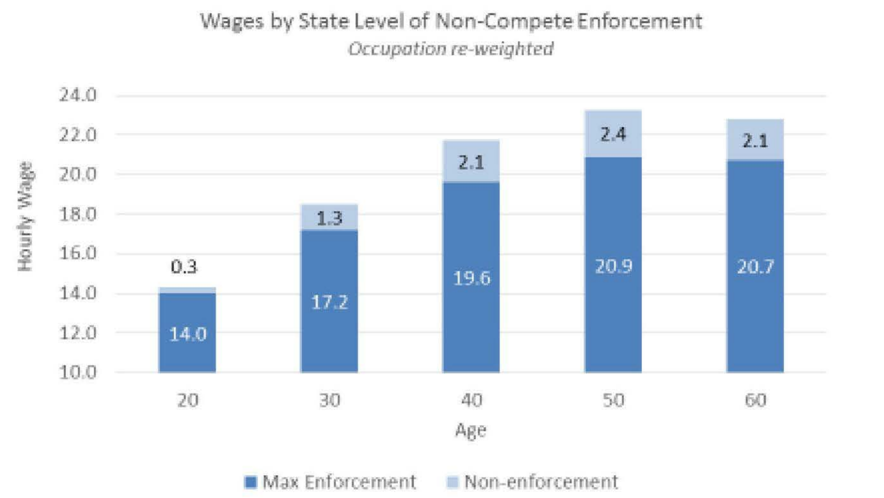
Effects of non-competes on <u>wages</u>

Worker bargaining power is reduced after a non-compete is signed, possibly leading to lower wages. When workers are legally prevented from accepting competitors' offers, those workers have less leverage in wage negotiations and fewer opportunities to develop their careers outside of their current firm.

The Treasury report indicates that stricter non-compete enforcement is associated with both lower wage growth and lower initial wages, finding that an increase in one standard deviation in non-compete enforcement reduces wages by about 1.4 percent. Recent work by Starr and coauthors finds broadly similar results.[5]

Given the potential for interaction between non-competes and on-the-job training, Treasury also analyzes the impact of stricter non-compete enforcement as workers age. If non-competes promote training, one would expect states with stronger enforcement to see faster wage growth as workers age and gain the tenure and experience that is typically associated with higher rates of training. As shown in the charts below, the analysis suggests that states with higher levels of non-compete enforcement see lower wages in general, and that wage disparities between high and low enforcements states actually grow as workers age.[6]

Workers in states with lower levels of non-compete enforcement on average have higher wages



Source: 2014 Current Population Survey, Starr et al. (2015), and Treasury calculations. All variables, with the exception of enforcement index and age, are held constant at their means

[5] Treasury uses the 2014 merged outgoing rotation groups of the Current Population Survey (CPS), which provide a cross section of population-representative workers. Merged with this data is the Starr-Bishara index of non-compete enforceability by state (generously provided by Evan Starr), as well as the fraction of workers with non-competes by major occupation from Starr, Bishara, and Prescott (2015).

[6] When interpreting any of the results just described, it should be remembered that we are not exploiting variation over time in non-compete enforcement; rather, the wage estimates are derived from variation across states. Even after controlling for available worker-level variables, states may differ in ways that are both relevant to wage growth and non-compete enforcement. As such, the results shown here should be seen as merely suggestive.

Effects of non-competes on <u>labor market dynamism</u>
The broad geographic and time scope of non-compete contracts can limit the mobility of workers in a long-lasting way, harming both the workers and the overall efficiency of labor markets. When lower paid, entry-level workers are prohibited from taking related employment for some time, they may lack the necessary skills to apply for other jobs, weakening their prospects for future employment and even their labor force attachment.

A study from Marx, Strumsky, and Fleming shows that worker job mobility fell by 8 percent when non-competes were made enforceable, with the effect even larger for workers with more narrowly-focused skills. However, other authors dispute these findings, arguing that the inadvertent legalization was not retroactive and that some states were inappropriately labeled as "non-enforcing." In separate work, Marx finds that workers who do switch jobs are more likely to leave their industry if they are covered by a non-compete, with the attendant "reduced compensation, atrophy of their skills, and estrangement from their professional networks" that would be expected to occur.[7]

Effects of non-competes on <u>innovation, entrepreneurship, and regional economic growth</u>
When firms in a given industry are clustered, it makes it easier for their workers to share expertise and discoveries, some of which may not be protected by trade secret or intellectual property legal provisions. Economists refer to geographic clustering effects of factors like a large, deep pool of skilled workers, a more competitive market of suppliers, and information spillovers across workers and firms as "agglomeration effects."

While not necessarily in the interest of an individual firm, more rapid dissemination of ideas and technology improvements can have significant positive impacts for the larger regional economy in terms of innovation, entrepreneurship, and attracting more businesses and jobs to a region. Non-competes that stifle mobility of workers who can disseminate knowledge and ideas to new startups or companies moving to a region can limit the process that leads to agglomeration economies. Overly broad non-compete provisions could prevent potential entrepreneurs from starting new businesses in similar sectors to their current employer, even if they relocate.

Potential issues presented by non-compete agreements

While we are still learning more about non-competes and their impact, the available evidence suggests that they can be used or enforced in ways that favor the interests of the firm over the worker.

Because of the potential issues presented by some non-competes, there is a growing movement in states to take action to limit the misuse of non-compete agreements. Several states are banning non-compete agreements outright for certain sectors and occupations. This year, Hawaii banned non-compete agreements for technology jobs, and New Mexico banned them for health care jobs. Others have taken steps to limit the scope of non-competes. Oregon recently banned non-compete agreements longer than 18 months, while Utah limited the agreements to one year.

[7] See Marx, Strumsky, and Fleming (2009) and Marx (2011).

California's legislature has rendered non-compete contracts generally unenforceable in their state. Some researchers have suggested that California, and Silicon Valley in particular, have benefited from this action, though compelling evidence is difficult to obtain[8].

At the federal level, legislation has been proposed to limit the use of non-compete agreements below a certain income threshold where they are less likely to have valid uses.

Over the coming months, the White House, Treasury and Labor will continue to explore these areas and possible solutions in engagement with states, businesses and experts. Below, we have listed seven areas that highlight how workers may be disadvantaged by non-competes, and how some states and state legislatures are attempting to address this issue.

1. Workers who are unlikely to possess trade secrets (in particular, low wage workers) are nonetheless compelled to sign non-competes.

Fourteen percent of workers earning less than $40,000 have signed non-competes, although those workers possess trade secrets at less than half the rate of their higher-earning counterparts.[9] When an employer requires low-wage employees to sign non-competes, it can effectively limit the ability of their workers to bargain for higher pay by making it harder for them to find new jobs. This can cause particular hardship for lower-skill workers who may not have marketable skills outside of their past employment. For example, a national sandwich chain required its employees to sign an expansive non-compete agreement that would ban them from working at just about any other fast-food restaurant.

Examples of Actions States or State Legislators Have Taken to Address this Issue: Because non-competes are less likely to have the social benefit of protecting trade secrets when applied to low-wage workers, some states have proposed, and Oregon has passed, legislation restricting the enforceability of non-competes for employees under a certain income threshold. In New Jersey and Maryland, bills were proposed, although they did not make it out of committee, that would render non-competes unenforceable for any workers eligible to receive unemployment compensation.[10]

State legislators in Washington and Idaho have introduced bills that would limit the reach of non-competes by designating certain workers who are more likely to have inside knowledge and trade secrets given their positions as "key employees," or by rendering void "unreasonable" competition agreements.

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[8] For example, see Gilson, Ronald J. 1999. "The Legal Infrastructure of High Technology Industrial Districts: Silicon Valley, Route 128, and Covenants Not to Compete." New York University Law Review 74 (3): 575–629.
[9] See Starr, Bishara and Prescott (2015).
[10] http://www.njleg.state.nj.us/2012/Bills/A4000/3970_I1.HTM; http://mgaleg.maryland.gov/2013RS/fnotes/bil_0001/sb0051.pdf

State Examples

- **Oregon**. (*Rev. Stat. 653.295)*: Non-competes are voidable and may not be enforced by Oregon courts unless several conditions are met. Examples of those conditions include, with limited exceptions, (1) when the employee's gross salary and commissions, calculated on an annual basis, at the time of the employees termination equal more than the median family income for a family of four as calculated by the Census Bureau for the most recent year available at the time of the employees termination, and (2) when particular compensation is paid to the employee during the period in which the employee is restricted from working.

- **Washington**. Proposed House Bill 2931 would render "unreasonable and void" employment noncompetition agreements if the employee is a seasonal or temporary employee, if the employee was terminated without just cause or laid-off by action of the employer, The bill also would also render void and unenforceable non-compete agreements that restrict employees from competing for more than one year after termination of employment, and those that apply to employees who are not executives. In addition, the bill would make noncompetition agreements involving independent contractors void and unenforceable. However, the bill is delayed for legislative consideration until at least next year.

- **Idaho**. (*Idaho Code Section 44-2701*): In 2008, Idaho passed a law that restricts non-competes to "key employees." "Key employees" are those who "by reason of the employer's investment of time, money, trust, exposure to the public, or exposure to technologies, intellectual property, business plans, business processes and methods of operation, customers, vendors or other business relationships during the course of employment, have gained a high level of inside knowledge, influence, credibility, notoriety, fame, reputation or public persona as a representative or spokesperson of the employer, and as a result, have the ability to harm or threaten an employer's legitimate business interests."

2. Workers are asked to sign a non-compete only after accepting a job offer, when they have already declined other offers and thus have less leverage to bargain.

The Treasury report notes that at least 37 percent of workers are asked to sign non-compete agreements after accepting a job offer. In cases where job offers have already been accepted, workers often have less leverage to bargain, in part because they may have already turned down other job offers. However, in many states, even if a worker was not made aware of a requirement to enter a non-compete agreement when she was hired, courts have enforced a covenant signed after employment commenced.

A separate survey, exclusively focused on members of the Institute of Electrical and Electronics Engineers, reports that "...barely 3 in 10 workers reported that they were told about the non-compete in their job offer. In nearly 70% of cases, the worker was asked to sign the non-compete after accepting the offer – and, consequently, after having turned down (all) other offers. Nearly half the time, the non-compete was not presented to employees until or after the first day at work."[11]

Examples of Actions States or State Legislators Have Taken to Address this Issue: In New Hampshire and Oregon, non-compete agreements may be rendered void for lack of consideration when employers fail to include them in the original terms of employment. Requiring that non-compete contracts be provided along with job offers and not after an offer is one possible solution to protect workers. In the case of internal promotion, states could require that employers provide employees with non-competes before the employee begins the new position.

State Examples

- **Oregon**. (*Rev. Stat. 653.295)*: In 2015, Oregon passed a law requiring firms to make clear in offer letters if employees will be expected to sign non-compete agreements. The non-compete must be provided at least 2 weeks before employment or with bona fide advancement.
- **New Hampshire.** *(Senate Bill 351):* In 2014, New Hampshire passed a law that requires that non-compete agreements that are executed as a condition of employment should be provided to potential employees prior to the acceptance of an offer of employment. Otherwise, the non-compete will not be enforceable against the employee.

3. Non-Competes, Their Implications, And Their Enforceability Are Often Unclear To Workers

Many workers report that they do not realize when they accept a job that they have signed a non-compete, or that they do not understand its implications.[12] Workers are often poorly informed about the existence and details of their non-competes, as well the relevant legal implications. Additionally, in states like California where non-competes are unenforceable, workers may be unaware about their legal enforceability. States could consider taking steps to ensure that important details on non-competes, like the duration and geographic scope of the contract, be clearly explained to workers.

Starr, Bishara, and Prescott (2015) find that only 10 percent of workers with non-competes report bargaining over their non-compete, with 38 percent of the non-bargainers not realizing that they could negotiate.

[11] Marx, Matt, and Lee Fleming. 2012. "Non-compete Agreements: Barriers to Entry…and Exit?" In Innovation Policy and the Economy, Volume 12, 39-64. Chicago: University of Chicago Press.
[12] Starr, Evan, Norman Bishara and JJ Present. 2015. "Noncompetes in the U.S. Labor Force."

4. Employers Often Write Non-Compete Agreements That Are Overly Broad Or Unenforceable

Some firms ask workers to sign non-competes that are entirely or partly unenforceable in certain jurisdictions. For instance, California workers are asked to enter into non-competes at a rate slightly higher than the national average (19 percent), despite the fact that, with limited exceptions, non-competes are not enforced in that state.

Given the well-documented worker confusion about these contracts (as stated in Starr, Bishara and Prescott's findings above), employers can exert a chilling effect on worker behavior even when their contracts are unenforceable.

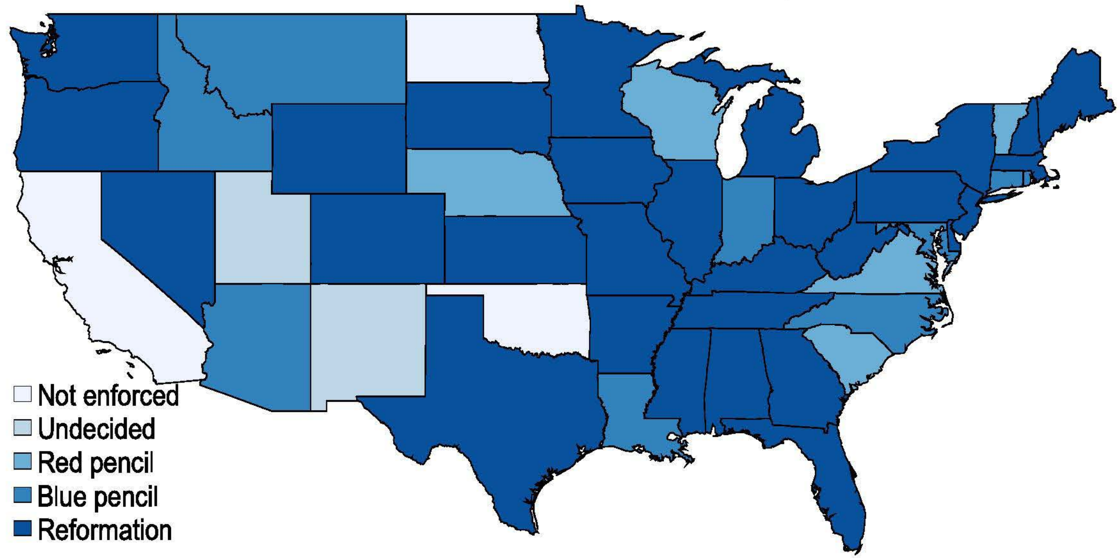
There are three main approaches that states are taking to address unenforceable or overly broad contracts, which vary greatly in terms of the incentives they provide employers.

- *"Equitable Reform."* The majority (about 30) of states are implementing equitable reform approaches, which are the most lenient on employers that require workers to enter into partially unenforceable contracts. In these states, courts allow employers to rewrite non-compete contracts to bring the contracts in line with state law.

- *"Blue Pencil" Doctrine*. Some states are implementing a "blue pencil" doctrine, which entails striking offensive clauses from non-compete contracts if doing so renders the remaining language enforceable under the state's law.

- *"Red Pencil" Doctrine*. Lastly, some states provide disincentives for employers to write non-compete contracts that are unenforceable by refusing to enforce and making void a non-compete contract that contains any unenforceable provisions. This practice is known as "red pencil" doctrine, and it can have the effect of increasing employers' incentive to write a contract that is fully enforceable. Research from the litigation firm Beck, Reed, and Riden LLP's 50 state non-compete survey indicates that three states—Nebraska, Virginia, and Wisconsin- are using this approach.

Non-compete Enforcement Regime



Source: A State by State Survey of Employee Noncompetes, Beck Reed Riden

State Examples of "Red Pencil" Doctrine

- **Virginia**. Although the Supreme Court of Virginia has not expressly ruled on the courts' power to "blue pencil" a non-compete agreement, several Virginia courts have declined to blue pencil non-compete agreements *(Lanmark Tech., Inc. v. Canales, 454 F. Supp. 2d 524, 529 (E.D. Va. 2006); Better Living Components, Inc. v. Coleman, 62005 WL 771592, at *5 (Va. Cir. Ct. Apr. 6, 2005)).* In addition, some courts have found that blue pencil provisions permitting judicial modification in non-compete agreements are invalid or discouraged under Virginia law *(Lasership Inc. v. Watson, 2009 WL 7388870, at *9 (Va. Cir. Ct. Aug. 12, 2009); Pace v. Ret. Plan Admin. Serv., Ltd., 2007 WL 5971432 (Va. Cir. Ct. Sept. 28, 2007)).*

- **Nebraska.** The Nebraska Supreme Court has refused to "blue pencil" or reform non-compete clauses when certain elements are overly broad or vague. For example, in the 2015 case *Unlimited Opportunity, Inc. v. Waadah*, the Court found that the geographic scope of the non-compete was too broad, and thus refused to enforce it. *(Unlimited Opportunity, Inc. v. Waadah, 290 Neb. 629 (2015)).*

5. Employers Requiring Non-Competes Often Do Not Provide "Consideration" That Is Above And Beyond Continued Employment

In the majority of states, when a non-compete is offered to an existing employee after the original offer of employment, continued employment is sufficient consideration for a non-compete to be enforceable. "Consideration" in this context refers to a benefit received by the signatory of a contract for a non-compete such as increased pay or more training.[13] Even for states that recognize continued employment, questions often arise about how long employment must continue to count as sufficient consideration. In addition, in the case where a worker with a non-compete is searching for a new job, the non-compete combined with a lack of severance pay can create hardship for that individual.

Examples of Actions States are Taking to Address this Issue: Currently, some states require that firms provide some "consideration" above and beyond continued employment such as pay raises, training, and promotions to workers who sign a non-compete after they have already worked for a firm for some amount of time. Just 11 states do not view continued employment as sufficient consideration" for the signing of a non-compete in this circumstance, and in DC, Illinois and Mississippi continued employment only counts as consideration if it is for a certain period of time.[14]

A study by Evan Starr finds that when states require firms to offer substantial consideration along with a non-compete (e.g., promotions, training, and higher wages), both training and wage outcomes for workers can be improved.

State Examples

- **Wyoming.** In Wyoming, a court found that continued employment alone does not provide the necessary consideration to support a covenant not to compete entered into after the employment relationship has already begun. Instead, separate consideration, such as a change in the terms and conditions of employment, must be given contemporaneously with the making of the covenant. This requirement apparently applies whether the employment is at-will or not (*Hopper v. All Pet Animal Clinic, Inc., 861 P.2d 531, 540 (Wyo. 1993)*).
- **Illinois.** In Illinois, continued employment for a "substantial period of time" is sufficient consideration for a non-compete agreement. A substantial period of time is generally two years. For example, in the case of *Brown & Brown, Inc. v. Mudron*, the court held that seven months of continued employment was insufficient consideration for a non-compete agreement. (*Brown & Brown, Inc. v. Mudron, 887 N.E.2d 437 (Ill. App. Ct. 2008)*).

6. In Some Cases, Non-Competes Can Prevent Workers From Finding New Employment Even After Being Fired Without Cause

In several states, non-competes are enforceable even for workers fired without cause (e.g., a layoff). Worker bargaining power can be particularly negatively affected when employers have the ability to unilaterally determine whether the worker may continue to be employed

[13] See Beck Reed Riden LLP.
[14] See Beck Reed Riden LLP.

anywhere in his or her occupation. The requirement of having been fired "without cause" would prevent workers from easily evading a non-compete obligation through behavior calculated to force an employer to discharge them.

Examples of Actions States are Taking to Address this Issue: While very few states have legislation prohibiting the enforcement of non-competes when an employee is fired without cause, in some states, courts have found that there is no "legitimate business interest" in a non-compete when the employer initiates the termination without cause. In this case, the non-compete is rendered unenforceable.

State Examples

- **Montana**. The Montana Supreme Court has found that it is difficult to establish a legitimate business interest for enforcement of a non-compete when the employer initiates the termination without cause. A 2011 Montana Supreme Court decision stated that a Montana employer— as in several other states — ordinarily will not be permitted to enforce a non-compete provision in an employment agreement where the employer was solely responsible for ending the employment relationship. Importantly, the court noted that circumstances may exist that could provide an employer with a legitimate business reason to enforce a non-compete such as in cases where the employee misappropriated trade secrets. *Wrigg v. Junkermier, Clark, Campanella, Stevens, P.C., Case No. DA 11-0147, 2011 MT 290 (Nov. 22, 2011).*

- **New York**. In *Arakelian v. Omnicare Inc. 735 F. Supp. 2d 22, 41 (S.D.N.Y. 2010),* the court affirmed that New York courts will not enforce non-compete agreements if the termination was involuntary stating that, "[e]nforcing a noncompetition provision when the employee has been discharged without cause would be 'unconscionable' because it would destroy the mutuality of obligation on which a covenant not to compete is based" (internal quotations omitted).

7. In Some Sectors, Non-Competes Can Have A Detrimental Effect On Health And Well-Being By Restricting Consumer Choice

In some instances, non-competes through imposing a restriction on free trade can interfere with consumers ability to acquire critical goods and services. For example, in the case of consumer choice for health care services (i.e. physicians, nurses, psychologists, social workers and other medical professionals), non-competes have the potential to interfere with the quality of care.

Little is known regarding the ubiquity of non-competes throughout differing job categories within the health care service sector. For physicians, it is plausible that there may be "legitimate business interests" that hospitals and service providers seek to protect. However, more attention on lower-wage segments of the industry, particularly within the home health care workers space, may provide much needed insight into a sub-sector that is poised to grow substantially over the next decade. These workers are less likely to possess knowledge of trade secrets and pose little to no competitive risk.

Examples of Actions States Are Taking to Address this Issue: Several states will not enforce non-competes where a "public interest" exists in the consumption of critical goods and services. Depending on the state, courts have recognized the importance of preserving the physician-patient relationship and have exempted them from being bound by a non-compete agreement (Delaware, Illinois, Tennessee, Texas, and Massachusetts). Yet in many states, no physician exemption exists. These states generally move toward limitations on enforceability, and in some cases, outright exemption.

State Examples

- **Delaware**. Delaware statute limits enforcement of non-competes against physicians, stating that "Any covenant not to compete provision of an employment, partnership or corporate agreement between and/or among physicians which restricts the right of a physician to practice medicine in a particular locale and/or for a defined period of time, upon the termination of the principal agreement of which the said provision is a part, shall be void…" The statute also expressly provides for reasonable damages provisions (*6 DEL. CODE § 2707*)

- **Colorado**. Colorado statute similarly states that, "Any covenant not to compete provision of an employment, partnership, or corporate agreement between physicians which restricts the right of a physician to practice medicine, as defined in section 12-36-106, C.R.S., upon termination of such agreement, shall be void…" (*COLO. REV. STAT. § 8-2-113(3)*)

- **Texas.** Texas code allows non-competes to be enforced against physicians only in narrow circumstances. Among other things, the covenant must (1) allow the physician access to his/her list of patients seen or treated within one year of termination of the contract or employment; (2) allow the physician access to patient medical records upon authorization of the patient; and (3) provide that the physician will not be prohibited from providing continuing care and treatment to a specific patient or patients during the course of an acute illness after the contract or employment has been terminated. (*TEX. BUS. & COM.CODE § 15.50(b)-(c)*).

Conclusion

In some cases, non-compete agreements can play an important role in protecting businesses and promoting innovation. They can also encourage employers to invest in training for their employees. However, as detailed in this report, non-competes can impose substantial costs on workers, consumers, and the economy more generally. This report informs future discussions and potential recommendations for reform by providing an overview of the research on the prevalence of non-competes, evidence of their effects, and examples of actions states are taking to limit the use and enforcement of unnecessary non-competes.

There is more work to be done. The Administration will identify key areas where implementation and enforcement of non-competes may present issues, examine promising practices in states, and identify the best approaches for policy reform. Researchers must continue to assess and identify promising policy reforms and the potential impact of those reforms including unintended consequences. Ultimately, most of the power is in the hands of State legislators and policymakers in their ability to adopt institutional reforms that promote the use and enforcement of non-competes in instances that appropriately weigh their costs and benefits and in ways that provide workers appropriate levels of transparency about their rights.

Labor Antitrust's Paradox

Hiba Hafiz†

Growing inequality, the decline in labor's share of national income, and increasing evidence of labor-market concentration and employer buyer power are all subjects of national attention, eliciting wide-ranging proposals for legal reform. Many proposals hinge on labor-market fixes and empowering workers within and beyond existing work law or through tax-and-transfer schemes. But a recent surge of interest focuses on applying antitrust law in labor markets, or "labor antitrust." These proposals call for more aggressive enforcement by the Department of Justice (DOJ) and Federal Trade Commission (FTC) as well as stronger legal remedies for employer collusion and unlawful monopsony that suppresses workers' wages.

The turn to labor antitrust is driven in part by congressional gridlock and the collapse of labor law as a dominant source of labor market regulation, inviting regulation through other means. Labor antitrust promises an effective attack because agency discretion and judicial enforcement can police labor markets without substantial amendments to existing law, bypassing the current impasse in Congress. Further, unlike labor and employment law, labor antitrust is uniquely positioned to challenge industry-wide wage suppression: suing multiple employers is increasingly challenging in work law as a statutory, doctrinal, and procedural matter.

But current labor-antitrust proposals, while fruitful, are fundamentally limited in two ways. First, echoing a broader antitrust policy crisis, they inherit and reinvigorate debates about the current consumer welfare goal of antitrust. The proposals ignore that, as a theoretical and practical matter, employers' anticompetitive conduct in labor markets does not necessarily harm consumers. As a result, workers' labor-antitrust challenges will face an uphill battle under current law: when consumers are not harmed, labor antitrust can neither effectively police employer buyer power nor fill gaps in labor market regulation left by a retreating labor law. Second, the proposals ignore real synergies between antitrust enforcement and labor regulation that could preempt the rise of employer buyer power and contain its exercise.

This Essay analyzes the limitations of current labor-antitrust proposals and argues for "regulatory sharing" between antitrust and labor law to combat the adverse effects of employer buyer power. It makes three key contributions. First, it frames the new labor antitrust as disrupting a grand regulatory bargain, reinforced by the Chicago School, that separated labor and antitrust regulation to resolve a perceived paradox in serving two masters: workers and consumers. The dominance of the consumer welfare standard resolved that paradox. Second, it explains how scholarly attempts to invigorate labor antitrust fail to overcome this paradox and ignore theoretical and doctrinal roadblocks to maximizing both worker and consumer welfare, leaving worker-plaintiffs vulnerable to failure. Third, it proposes a

† Assistant Professor of Law, Boston College Law School. I am deeply grateful to Eric Posner, Sanjukta Paul, Brian Callaci, and the participants of the Reassessing the Chicago School of Antitrust Law Symposium for their helpful comments and suggestions.

novel restructuring of labor market regulation that integrates antitrust and labor law enforcement to achieve coherent and effective regulation of employer buyer power. It refocuses labor-antitrust claims on consumer welfare ends. In doing so, it also relegates worker welfare considerations to a labor law supplemented and fortified by the creation of substantive presumptions and defenses triggered by labor-antitrust findings as well as labor agency involvement in merger review.

INTRODUCTION

Growing inequality, the decline in labor's share of national income, and increasing evidence of labor-market concentration and employer buyer power are all subjects of national attention, eliciting wide-ranging proposals for legal reform. Many proposals hinge on either labor market fixes, empowering workers within and beyond existing work law, or tax-and-transfer schemes.[1] But a recent surge of interest focuses on applying antitrust law in labor markets, or "labor antitrust." These proposals call for more aggressive enforcement by the Department of Justice (DOJ) and Federal Trade Commission (FTC) as well as stronger legal remedies for employer collusion and unlawful monopsony that suppresses workers' wages.[2]

The turn to labor antitrust is driven in part by congressional gridlock and the collapse of labor law as a dominant source of labor market regulation, inviting regulation through other means. Labor antitrust promises an effective attack because agency discretion and judicial enforcement can police labor markets without substantial amendments to existing law, bypassing the current impasse in Congress. Further, unlike labor and employment law, labor antitrust is uniquely positioned to challenge industry-wide

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1 See generally, for example, Joseph R. Fishkin and William E. Forbath, *The Anti-Oligarchy Constitution* (forthcoming Harvard 2020) (on file with author) (urging a constitutional critique of inequitable wealth concentration); Kate Andrias, *The New Labor Law*, 126 Yale L J 2 (2016). For tax policy discussions, see, for example, Eric A. Posner and E. Glen Weyl, *Radical Markets: Uprooting Capitalism and Democracy for a Just Society* 205–49 (Princeton 2018); Thomas Piketty, *Capital in the Twenty-First Century* 471–570 (Harvard 2014) (Arthur Goldhammer, trans); Emmanuel Saez, *Income and Wealth Inequality: Evidence and Policy Implications*, 35 Contemp Econ Pol 7, 18–24 (2017).

2 See, for example, Ioana Marinescu and Herbert Hovenkamp, *Anticompetitive Mergers in Labor Markets*, 94 Ind L J 1031, 1048–63 (2019) (explaining how courts should evaluate challenges to labor monopsonies under the Clayton Act); Suresh Naidu and Eric A. Posner, *Labor Monopsony and the Limits of the Law* *7–26 (working paper, Jan 13, 2019), archived at https://perma.cc/52RQ-LK45; Ioana Marinescu and Eric A. Posner, *Why Has Antitrust Law Failed Workers?* *31–40 (working paper, Mar 10, 2019), archived at https://perma.cc/GD3B-XJLD; Suresh Naidu, Eric A. Posner, and Glen Weyl, *Antitrust Remedies for Labor Market Power*, 132 Harv L Rev 536, 574–99 (2018).

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This Essay analyzes the limitations of current labor-antitrust proposals and argues for *regulatory sharing* between antitrust and labor law to combat the adverse effects of employer buyer power. It makes three key contributions. First, it frames the new labor antitrust as disrupting a grand regulatory bargain, reinforced by the Chicago School, that separated labor and antitrust regulation to resolve a perceived paradox in serving two masters: workers and consumers. The dominance of the consumer welfare standard resolved that paradox. Second, it explains how scholarly attempts to invigorate labor antitrust fail to overcome this paradox and ignore theoretical and doctrinal roadblocks to maximizing *both* worker and consumer welfare, leaving worker-plaintiffs vulnerable to failure. Third, it proposes a novel restructuring of labor market regulation that integrates antitrust and labor law enforcement to achieve coherent and effective regulation of employer buyer power. It refocuses labor-antitrust claims on consumer welfare ends and relegates worker welfare considerations to a labor law supplemented and fortified by the creation of substantive presumptions and defenses triggered by labor-antitrust findings as well as labor agency involvement in merger review.

I. The Rise of Labor Antitrust's Paradox

A. Identifying the Paradox: Chicago School Approaches

As has been well documented, the Chicago School elevated economic analysis and the consumer welfare standard in antitrust policy and doctrine.[3] But it also established a strict separation between labor and product market regulation, focusing exclusively on worker combinations' anticompetitive effects on consumer prices.[4] Judge Robert Bork explicitly relegated decisions on how to value collectively bargained wage premiums over maximizing consumer welfare to congressional policy: "We . . . reserve the choice for legislative determination and require the terms of the treaty—between . . . laborers and consumers . . .—to be written down, with the resultant . . . value trade-offs specified in . . . labor-management relations laws."[5] The legislative mandate "encourag[ing] [ ] labor union formation to enhance the gains of some workers at the expense of consumers" meant that labor-antitrust regulation exceeded the judicial role:

> For some time . . . the federal courts, not perceiving the basic incongruity of the attempt, did try to govern labor-management relations through the Sherman Act. The incongruity lay in the attempt to permit labor unions as cartels fixing the price of labor but to *regulate* their behavior. This was identical with a decision to permit cartelization but to require that the cartel charge only "reasonable" prices, a course the Court refused to take in nonlabor cases. The result . . . was an incoherent body of law. . . .
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> Courts are the wrong institution for these unstructured interpersonal comparisons both because political choices of this nature should . . . be made by elected and representative institutions, and because the courts do not have the facilities for fact-finding on a broad scale that are available to the legislature. The admission by a court of goals in conflict with consumer welfare into the adjudicative process, therefore, involves a serious usurpation of the legislative function.[6]

Bork's core concerns were administrability and avoiding "rate regulation" to ensure "reasonable" wages; such could not be the

3 See, for example, Douglas H. Ginsburg, *Judge Bork, Consumer Welfare, and Antitrust Law*, 31 Harv J L & Pub Pol 449, 450–52 (2008); Richard A. Posner, *The Chicago School of Antitrust Analysis*, 127 U Pa L Rev 925, 928 (1979) (discussing the role of price theory in the Chicago School).

4 See generally, for example, Thomas J. Campbell, *Labor Law and Economics*, 38 Stan L Rev 991 (1986); Douglas L. Leslie, *Principles of Labor Antitrust*, 66 Va L Rev 1183 (1980); Richard A. Posner, *Some Economics of Labor Law*, 51 U Chi L Rev 988 (1984).

5 Robert H. Bork, *The Antitrust Paradox: A Policy at War with Itself* 80 (Basic Books 1978).

6 Id at 83 (emphasis added).

antitrust court's task.[7] Bork likewise relegated distributional decisions to the political branches because these decisions "require[ ] a choice between two groups of consumers that should be made by the legislature."[8]

Thus, traditional Chicago School accounts were skeptical of labor-antitrust enforcement, arguing that "[t]he effect of a labor-market restraint on price and output may be as great as that of a business-market restraint; however, the legislative choice to sanction some union acts but not others seems to rest on considerations beyond those of competition and efficiency."[9] They concentrated instead on labor market restraints that were "part of a scheme to regulate the product market by controlling prices, outputs, or market allocations."[10]

As a result of these developments, and of the Chicago School's intellectual dominance in modern antitrust, employer monopsony and collusion were, at best, underenforced and underdiscussed. The DOJ and FTC's Horizontal Merger Guidelines from 1968 through 1997 made no reference to mergers that enhance buy-side market power, and when the 2010 Guidelines introduced buy-side effects, there was no mention of whether or how to assess such effects in labor markets.[11]

B. Regulatory Détente: Antitrust's Labor Exemption

The Chicago School's identification of labor antitrust's paradox echoed a long-standing regulatory détente that placed worker combinations and vertical employer-employee restraints under a separate regime from antitrust law: labor law. Workers partially won antitrust immunity under the Clayton[12] and Norris-LaGuardia[13] Acts' "statutory" exemption, which protected union conduct during a labor dispute as long as that conduct was peaceful, in the union's own interest, and not combined with nonlabor groups.[14]

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7 See id at 79–88.

8 Id at 111.

9 Leslie, 66 Va L Rev at 1184 (cited in note 4). See also Campbell, 38 Stan L Rev at 992–94 (cited in note 4); Posner, 51 U Chi L Rev at 989–90 (cited in note 4).

10 Leslie, 66 Va L Rev at 1185 (cited in note 4).

11 See Department of Justice and Federal Trade Commission, *Horizontal Merger Guidelines* § 12 (Aug 19, 2010), archived at https://perma.cc/E4WS-NMAG; Naidu, Posner, and Weyl, 132 Harv L Rev at 540 (cited in note 2). See also note 82.

12 38 Stat 730 (1914), codified as amended in various sections of Title 15 and Title 29.

13 Pub L No 72-65, 47 Stat 70 (1932), codified as amended at 29 USC § 101 et seq.

14 15 USC § 17; 29 USC §§ 52, 101, 104, 113.

The exemption was motivated by the view that labor was not a "commodity" whose price should be set by market forces alone.[15] The bifurcation of labor from antitrust regulation was a means of targeting corporate combinations to ensure interfirm competition while protecting *worker* combinations from wage-setting through "prodigal and damaging" competition.[16] For the 1914 Congress, the exemption rejected "the point of view of some economists" that labor, "like potatoes, or steel . . . is offered by the owner in the highest market and sought by the buyer in the lowest market."[17] It was justified under classical political economy, matured through nineteenth-century American labor republicanism, to protect workers' liberty and achieve "a higher and *just price* for . . . labor."[18] Congressional debates on the Norris-LaGuardia Act reiterated this view:

> The constantly increasing combinations of wealth have [ ] built up court-made law which has placed the laborer at the mercy of capital, has denied to him a fair wage and a fair opportunity for freedom of contract. Shall combinations of wealth enslave the workingmen, or shall Congress give the laboring men the right to use their collective strength against the combination of wealth?[19]

The 1935 enactment of the National Labor Relations Act[20] (NLRA) created a regulatory home for worker combinations. It was the first legislation to explicitly introduce the problem of employer buyer power into labor-market regulation, and its purpose was to prevent the "inequality of bargaining power between employees who do not possess full freedom of association or actual liberty of contract, and employers who are organized in the corporate or other forms of ownership" from "depressing wage rates and the purchasing power of wage earners."[21] The NLRA justified worker combinations as a countervailing power that, in the words

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15 See 15 USC § 17.

16 75 Cong Rec 5425, 5513 (1932) (statement of Rep White).

17 51 Cong Rec 14585, 14608 (1914) (statement of Sen Kern).

18 Id at 14587 (statement of Sen Lewis) (emphasis added). For the history of "free labor," "the justice price," and labor republicanism, see Alex Gourevitch, *From Slavery to the Cooperative Commonwealth: Labor and Republican Liberty in the Nineteenth Century* 82–86 (Cambridge 2015); William Boyd, *Just Price, Public Utility, and the Long History of Economic Regulation in America*, 35 Yale J Reg 721, 733–36 (2018).

19 75 Cong Rec at 5487 (statement of Rep Sparks) (cited in note 16).

20 Pub L No 74-198, 49 Stat 449, codified as amended at 29 USC § 151 et seq.

21 29 USC § 151.

of its sponsor, Senator Robert Wagner, "match[ed] the huge aggregates of modern capital."[22] But workers' protected "cartel" activity was presumptively limited to single-firm bargaining units, and strike protections extended almost exclusively to strikes directed against that single-firm employer.[23]

This regulatory bargain was a precarious détente. The lines between labor and antitrust regulation blurred with the imposition of antitrust liability on worker combinations for: (1) boycotting *other* firms that dealt with their employer during labor disputes; (2) joining with their employers to exclude employers' nonunionized competitors in downstream markets; and (3) combining as NLRA-exempt workers, like independent contractors.[24] Worker liability for the effects of their actions on product markets evolved into a "nonstatutory" labor exemption, in which courts impose liability if they find the NLRA's labor policy favoring collective bargaining is *outweighed* by antitrust policy favoring free competition in business markets.[25] So if NLRA-protected workers act alone—say, by striking—to compel their employer to agree to better wages, they are entitled to antitrust immunity.[26] But if workers agree with a "nonlabor party [ ] to restrain competition in a business market,"[27] or compel employers "to impose a certain wage scale on other bargaining units,"[28] their behavior falls *outside* the exemption: courts have characterized such behavior as a "restraint on the business market [that] has substantial anticompetitive effects . . . that would not follow naturally from the elimination of competition over wages and working conditions."[29]

Antitrust liability was exclusively imposed on *worker* combinations; employers suffered no antitrust liability for employer-employer collusion, labor-market monopsony, or buyer power over nonunionized or unprotected workers. The Supreme Court even said, in *Apex Hosiery Co v Leader*,[30] that "an elimination of price

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22 Robert Wagner, *The New Responsibilities of Organized Labor*, NY State Federation of Labor Convention Address ¶ 5 (1928), reprinted in 70 Cong Rec 225, 227.

23 See 29 USC § 159(b); *Dixie Belle Mills, Inc*, 139 NLRB 629, 630–32 (1962); *J&L Plate, Inc*, 310 NLRB 429, 429–30 (1993). Multi-employer bargaining units are rare.

24 See, for example, *Connell Construction Co v Plumbers and Steamfitters Local Union No 100*, 421 US 616, 621–23 (1975); *Federal Trade Commission v Superior Court Trial Lawyers Association*, 493 US 411, 422–23 (1990).

25 See *Connell*, 421 US at 622.

26 See, for example, *United States v Hutcheson*, 312 US 219, 233 (1941).

27 *Connell*, 421 US at 622–23.

28 *United Mine Workers of America v Pennington*, 381 US 657, 665 (1965).

29 *Connell*, 421 US at 625.

30 310 US 469 (1940).

competition based on differences in labor standards" between employers "has not been considered to be the kind of curtailment of price competition prohibited by the Sherman Act."[31] Some scholars interpret *Apex Hosiery* more broadly—as holding that "the Sherman Act . . . would simply not apply to a certain class of restraints. Employers, or employers in combination with unions, would presumably be as free as *unions* acting alone to halt competition grounded in wage differentials."[32]

Commentary in the Warren Court era warned that strategic application of the labor exemption would disrupt the détente, wrongly committing "the federal judiciary to the formulation of national labor policy by reaffirming the Sherman Act as an *independent head* of federal jurisdiction in labor disputes."[33] For example, in evaluating the Court's application of the Sherman Act to unions' secondary boycotts—boycotts against nonemployers to pressure direct employers or expand union density—Professor Ralph Winter concluded that a "*per se* ban on secondary boycotts [ ] cannot be based solely on a desire to maintain competition but necessarily stems from a judicial judgment as to how much power unions should have."[34] He argued that antitrust should stay out of regulating labor markets—even when worker conduct has product-market effects—to preserve collective bargaining as "a *system* of private ordering" in which "radical tampering must be at the price of restrictions on freedom and will necessarily have unpredictable results."[35]

C. Disrupting the Détente: The New Labor Antitrust

The recent focus of attention on the anticompetitive effects of employer buyer power has prompted calls for aggressive labor-antitrust enforcement and even incorporation of work-law violations into antitrust liability analysis against employers.[36] Professors Eric Posner, Glen Weyl, Suresh Naidu, Herbert Hovenkamp, Ioana Marinescu, and Marshall Steinbaum have theorized and

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[31] Id at 503–04.

[32] Theodore J. St. Antoine, Connell*: Antitrust Law at the Expense of Labor Law*, 62 Va L Rev 603, 606 (1976) (emphasis added).

[33] Ralph K. Winter Jr, *Collective Bargaining and Competition: The Application of Antitrust Standards to Union Activities*, 73 Yale L J 14, 34 (1963) (emphasis added).

[34] Id at 36.

[35] Id at 68 (emphasis added).

[36] See note 2; Ioana Marinescu and Eric A. Posner, *A Proposal to Enhance Antitrust Protection Against Labor Market Monopsony* *13–16 (Roosevelt Institute Working Paper, 2018), archived at https://perma.cc/HJK5-A6D7.

empirically analyzed the effects of employer market power on worker pay, primarily to inform government merger enforcement strategies (and, to a lesser extent, employer restraints and conduct under Sections 1 and 2 of the Sherman Act).[37] For the most part, this scholarship prescribes how scrutinized conduct should be deemed anticompetitive under traditional structural industrial organization (IO) models and methods, demonstrating their administrability and easy integration into existing enforcement.[38]

Government and private enforcers have followed suit, challenging employer collusion on wages, no-poaching agreements, and unlawful monopsonization while announcing incorporation of labor market effects in merger review.[39] The DOJ Antitrust Division and the FTC have condemned and announced their intent to criminally prosecute naked wage restraints and horizontal no-poaching agreements as per se unlawful.[40] And the FTC has conducted hearings to investigate and publicize the problem of anticompetitive conduct in labor markets.[41]

But by not seriously contending with theoretical, doctrinal, and factual reasons why worker and consumer welfare are not always aligned, the new labor-antitrust scholarship revives labor antitrust's paradox. Many scholars claim their proposals are

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37 See note 2; C. Scott Hemphill and Nancy L. Rose, *Mergers that Harm Sellers*, 127 Yale L J 2078, 2082–85 (2018). See generally Alan B. Krueger and Eric A. Posner, *A Proposal for Protecting Low-Income Workers from Monopsony and Collusion* (The Hamilton Project, Feb 2018), archived at https://perma.cc/YC7H-49YJ. For empirical work, see generally Jose A. Azar, et al, *Concentration in US Labor Markets: Evidence from Online Vacancy Data* (National Bureau of Economic Research Working Paper No 24395, Feb 2019), archived at https://perma.cc/4EQF-C6ZB; David Berger, Kyle Herkenhoff, and Simon Mongey, *Labor Market Power* (Institute of Labor Economics Discussion Paper No 12276, Apr 2019), archived at https://perma.cc/NWA8-4LZH; Arindrajit Dube, et al, *Monopsony in Online Labor Markets* (National Bureau of Economic Research Working Paper No 24416, Mar 2018), archived at https://perma.cc/2E7T-L7D4.

38 See Naidu, Posner, and Weyl, 132 Harv L Rev at 539, 542, 584 (cited in note 2). See also Marinescu and Hovenkamp, 94 Ind L J at 1034, 1044 (cited in note 2). See generally Adil Abdela and Marshall Steinbaum, *Labor Market Impact of the Proposed Sprint–T-Mobile Merger* (Economic Policy Institute and Roosevelt Institute, Dec 2018), archived at https://perma.cc/Q5UC-YZT6.

39 See *Horizontal Merger Guidelines* at § 12 (cited in note 11).

40 Department of Justice and Federal Trade Commission, *Antitrust Guidance for Human Resource Professionals* *3 (Oct 2016), archived at https://perma.cc/DVQ6-LHA3.

41 See generally Federal Trade Commission, *Hearing on Competition and Consumer Protection in the 21st Century* (Oct 15–17, 2018), archived at https://perma.cc/MZ2Y-Z5Y5; Federal Trade Commission, *Hearing on Competition and Consumer Protection in the 21st Century* (Oct 16, 2018), archived at https://perma.cc/YK62-XR3K; Federal Trade Commission, *Hearing on Competition and Consumer Protection in the 21st Century* (Oct 17, 2018), archived at https://perma.cc/NGP4-YVN2.

consistent with the consumer welfare standard because, they postulate, employer buyer power harms consumers: it results in reduced labor inputs, reduced labor inputs in turn reduce outputs downstream, and output reduction results in higher prices and deadweight loss that harms consumers.[42] But theory, doctrine, and the empirical realities of current labor markets undermine this account. Other scholars reject the consumer welfare standard, proposing worker welfare, overall welfare, or broader "public interest" or "effective competition" standards.[43] Worker welfare standard proponents argue that, in evaluating employers' anticompetitive conduct, harm to workers should be sufficient to trigger antitrust liability.[44] Aggregate welfare proponents would weigh anticompetitive effects in labor markets against efficiencies created in product markets.[45] Neo-Brandeisians propose an "effective"[46] or "protection of competition"[47] standard. Under the effective-competition standard, antitrust policy would protect individuals, consumers, workers, and others throughout the supply chain, but would also focus on preserving opportunities for competitors, promoting individual autonomy and well-being, and

[42] See, for example, Naidu, Posner, and Weyl, 132 Harv L Rev at 559 (cited in note 2); Marinescu and Hovenkamp, 94 Ind L J at 1062–63 (cited in note 2); Gregory J. Werden, *Monopsony and the Sherman Act: Consumer Welfare in a New Light*, 74 Antitrust L J 707, 713–21 (2007).

[43] See, for example, Peter C. Carstensen, *Competition Policy and the Control of Buyer Power* 16–37 (Edward Elgar 2017); Marshall Steinbaum and Maurice E. Stucke, *The Effective Competition Standard: A New Standard for Antitrust* *29–48 (Roosevelt Institute, Sept 2018), archived at https://perma.cc/AR68-6XKN. See also generally Bork, *Antitrust Paradox* (cited in note 5); Jeffrey L. Harrison, *A Socio-Economic Approach to Antitrust: Unpacking Competition, Consumer Surplus, and Allocative Efficiency*, 49 Akron L Rev 409 (2016); Werden, 74 Antitrust L J 707 (cited in note 42).

[44] See, for example, The White House, *Non-Compete Agreements: Analysis of the Usage, Potential Issues, and State Responses* *5 (May 2016), archived at https://perma.cc/6MH6-D2TH; Naidu, Posner, and Weyl, 132 Harv L Rev at 586–87 (cited in note 2) ("[M]ergers that trigger scrutiny by reducing labor market competition should be subject to a 'worker welfare' standard.").

[45] See, for example, Department of the Treasury, Office of Economic Policy, *Non-Compete Contracts: Economic Effects and Policy Implications* *3, 22–23 (Mar 2016), archived at https://perma.cc/HSF2-XAYJ; Marinescu and Hovenkamp, 94 Ind L J at 1057–61 (cited in note 2); Hemphill and Rose, 127 Yale L J at 2080–2110 (cited in note 37) (proposing a "trading partner welfare" standard). But see Alan Manning, *Monopsony in Motion: Imperfect Competition in Labor Markets* 63–66 (Princeton 2003) (arguing that monopsony power reduces both consumer and aggregate welfare).

[46] See, for example, Steinbaum and Stucke, *Effective Competition Standard* at *29 (cited in note 43).

[47] See, for example, Tim Wu, *The Curse of Bigness: Antitrust in the New Gilded Age* 135–39 (Columbia Global Reports 2018).

de-concentrating private power.[48] The protection-of-competition test "might [ ] consider[ ]" consumer welfare harms, but the ultimate concern would be "distortion or suppression of the competitive process."[49]

II. Paradoxical Limitations of the New Labor Antitrust

Worker- and consumer-welfare conflicts can occur as a matter of theory, doctrine, and fact. This Part presents the range of employers' procompetitive justifications of, and defenses to, labor market restraints and the resulting challenges labor antitrust faces under the consumer welfare standard. These challenges limit worker protection against monopsonistic and colluding employers.

A. Conflict Between Consumer and Worker Welfare: Economic Theory

Commentators argue that labor-antitrust enforcement is consistent with the consumer welfare standard under economic theory: when employers exercise their monopsony power by reducing their purchase of labor inputs, that reduces outputs in product markets, raising prices to consumers.[50] In other words, labor-market restraints that increase monopsony power are bad for workers *and* consumers. While this may be true at least sometimes, it is not always true.

First, commentators concede that prices to consumers will not increase if product markets are competitive or when "reduced sales . . . will be *offset*" by new firms' sales.[51] Second, this account assumes a monopsonist cannot wage discriminate between employees; if it *can*, it can suppress compensation without reducing labor inputs by hiring new workers at different pay rates.[52] In this case as well, workers would be harmed but consumers not. And

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48 Steinbaum and Stucke, *Effective Competition Standard* at *29 (cited in note 43).

49 Tim Wu, *After Consumer Welfare, Now What? The "Protection of Competition" Standard in Practice* *9 (Competition Policy International, Apr 2018), archived at https://perma.cc/3G26-63U4.

50 See, for example, Naidu, Posner, and Weyl, 132 Harv L Rev at 559 (cited in note 2).

51 Id at 559 n 93 (emphasis added). See also *United States v Syufy Enterprises*, 903 F2d 659, 663 (9th Cir 1990) (finding that the defendant exercised monopsony power only against supplier film distributors, not consumer moviegoers).

52 See Naidu, Posner, and Weyl, 132 Harv L Rev at 558 (cited in note 2) ("[W]aste created by monopsony . . . depends on the inability of firms to pay [ ] different rates to different workers. . . . But employers cannot practice wage discrimination very effectively."); Roger D. Blair and Jeffrey L. Harrison, *Monopsony in Law and Economics* 41–48 (Cambridge 2010).

wage discrimination is not merely a theoretical concern. While employers are restrained by having "little information about workers' outside options and are deterred by powerful pay fairness norms," they nevertheless exploit a wide set of tools for expansive wage discrimination schemes: they obviate pay fairness and information asymmetries by hiring subcontracted, outsourced, and temporary workers.[53] And employers have succeeded in imposing significant technological monitoring to reduce pay and work law compliance costs.[54] The prevalence of wage discrimination has only increased as workplace fissuring has advanced.[55] Finally, even when reduced labor inputs *in fact* reduce outputs in product markets, courts still credit cognizable economic efficiencies.

B. Labor Antitrust's Paradox: Government Enforcement and Antitrust Doctrine

Agency and court reliance on the consumer welfare standard in labor antitrust and monopsony cases reveals limitations on labor antitrust's ability to effectively regulate employer conduct that harms workers.

First, the agencies have argued that employers' labor market restraints that harm workers may not always harm consumers. In the franchising context, the DOJ has moved away from per se challenges to franchisors' use of no-poaching provisions in franchisee agreements, contending that a more extensive rule-of-reason analysis is required to consider procompetitive benefits of these restraints on consumers—even a "quick-look" analysis is inappropriate.[56] While the DOJ and FTC stated in their Guidance to Human Resource Professionals that no defenses will be considered in per se wage-fixing and no-poaching cases, defenses may be considered when reviewing the use of noncompete clauses or

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53 Naidu, Posner, and Weyl, 132 Harv L Rev at 558 (cited in note 2).

54 See generally, for example, David Weil, *The Fissured Workplace: Why Work Became So Bad for So Many and What Can be Done to Improve It* (Harvard 2014); Alan B. Krueger, *Reflections on Dwindling Worker Bargaining Power* (Princeton University and National Bureau of Economic Research Luncheon Address, 2018), archived at https://perma.cc/8N4C-WEEP; Arindrajit Dube and Ethan Kaplan, *Does Outsourcing Reduce Wages in the Low-Wage Service Occupations? Evidence from Janitors and Guards*, 63 Indust Labor Rel Rev 287 (2010); Brian Callaci, *Vertical Power and the Creation of a Fissured Workplace: The Case of Franchising* (University of Massachusetts Amherst Working Paper, Sept 5, 2018), archived at https://perma.cc/9QMA-EGFU.

55 See Weil, *Fissured Workplace* at 87–92 (cited in note 54).

56 See Bryan Koenig, *Can No-Poach Class Actions Beat the Rule of Reason?* (Law360, Jan 30, 2019), online at https://www.law360.com/articles/1123789 (visited Sept 4, 2019) (Perma archive unavailable).

information-sharing.[57] And in congressional testimony, FTC Chair Joseph Simons left open the possibility that, when the FTC evaluates "potential anticompetitive impacts on labor" in merger reviews, those impacts would be weighed against merger-specific efficiencies.[58] When asked whether "the 'consumer welfare' standard accounts for labor market concerns," he responded elusively: "Yes. Antitrust enforcement protects the competitive process, which benefits consumers, in labor markets as it does for other markets."[59]

Workers also face obstacles when confronting the consumer welfare standard in the courts. While employers' horizontal wage-fixing is per se unlawful,[60] all other labor market restraints are subject to case-by-case analysis in which courts consider procompetitive or legitimate business justifications.[61] While most courts find that workers can sufficiently allege antitrust injury for wage-fixing or no-poaching agreements,[62] courts have not rejected employer defenses that alleged restraints benefit consumers under

57 See *Antitrust Guidance for Human Resource Professionals* at *3–4 (cited in note 40); *Questions for Joseph Simons, Chairman, Federal Trade Commission, Before the Senate Committee on the Judiciary*, 115th Cong, 2d Sess 35 (2018) (*Antitrust Enforcement Hearing*) ("[N]arrowly tailored noncompete clauses can benefit competition.").

58 See *Antitrust Enforcement Hearing* at 31 (cited in note 57).

59 Id at 24.

60 See, for example, *United States v Trenton Potteries Co*, 273 US 392, 398 (1927); *United States v Socony-Vacuum Oil Co*, 310 US 150, 216 (1940).

61 See, for example, *O'Bannon v National Collegiate Athletic Association*, 802 F3d 1049, 1069 (9th Cir 2015) (applying rule of reason to NCAA decision not to compensate student-athletes); *Todd v Exxon Corp*, 275 F3d 191, 198, 214–15 (2d Cir 2001) (reversing district court's dismissal and holding employers' horizontal conspiracy to exchange salary information subject to rule of reason); *Eichorn v AT&T Corp*, 248 F3d 131, 143–44 (3d Cir 2001) (holding no-hire agreements subject to rule of reason); *Butler v Jimmy John's Franchise, LLC*, 331 F Supp 3d 786, 797 (SD Ill 2018) (refusing to decide at motion to dismiss whether franchisees' no-poaching agreements should be subject to the per se rule, quick look analysis, or the rule of reason); *Deslandes v McDonald's USA, LLC*, 2018 WL 3105955, *7–8 (ND Ill) (reviewing franchisee no-poaching agreement under "quick look" but suggesting later-stage evidence may require rule of reason); *In re Animation Workers Antitrust Litigation*, 123 F Supp 3d 1175, 1214 (ND Cal 2015) (denying motion to dismiss and holding employers' information-sharing/no-solicitation agreements subject to per se rule); *United States v eBay, Inc*, 968 F Supp 2d 1030, 1039–40 (ND Cal 2013) (refusing to decide on motion to dismiss whether employers' no-solicitation/no-hire agreements should be subject to the per se rule, quick look analysis, or the rule of reason); *In re High-Tech Employee Antitrust Litigation*, 856 F Supp 2d 1103, 1122 (ND Cal 2012) (refusing to decide on motion to dismiss whether employers' "no-cold calling" agreements should be subject to the per se rule or the rule of reason); *Fleischman v Albany Medical Center*, 728 F Supp 2d 130, 157–58, 162 (NDNY 2010) (holding wage-fixing agreements subject to the per se rule but information exchanges subject to the rule of reason). Most cases were resolved before summary judgment.

62 See, for example, *Butler*, 331 F Supp 3d at 793–94.

quick-look or rule-of-reason analyses.[63] And in traditional product-market monopsony cases, consumer welfare benefits "entirely trump harm to input sellers."[64] Thus, case law on employer restraints suggests workers will face challenges in two categories of cases: when buyer restraints on inputs (1) harm direct sellers—workers—but benefit consumers in downstream markets, or (2) benefit direct sellers but harm consumers in downstream markets.

1. Harming workers, benefiting consumers.

Courts and the antitrust agencies have credited consumer welfare benefits in a range of input restraints by employers (and other buyers), whether they be horizontal competitors, counterparties in vertical agreements, monopsonists, or merging firms. While courts have held that procompetitive benefits can outweigh harms to sellers, this remains an unsettled area of law.

First, courts have recognized consumer benefits from horizontal agreements between employers *not* governed by the per se rule—agreements reviewed under the ancillary restraints doctrine—demonstrating reluctance to condemn conduct that clearly harms workers. For example, in *O'Bannon v National Collegiate Athletic Association*,[65] defendant NCAA established amateurism rules that prohibited member universities from compensating student-athletes beyond grant-in-aid scholarships.[66] Student-athletes sued, alleging the rules, by preventing compensation for use of their name, image, and likeness (NIL), violated Section 1 of the Sherman Act.[67] Although the student-athletes won at trial, the Ninth Circuit reversed in part on the ground that, while the rule of reason required the NCAA to permit schools to compensate student-athletes up to their cost of attendance, it did not require cash compensation for their NIL untethered to education expenses.[68] The court was persuaded by the NCAA's procompetitive justifications for the amateurism rules—increasing consumer

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[63] See note 72. Recent case law suggests courts will apply traditional rule-of-reason burden shifting to labor-antitrust cases. See, for example, *O'Bannon*, 802 F3d at 1070.

[64] Laura Alexander, *Monopsony and the Consumer Harm Standard*, 95 Georgetown L J 1611, 1627 (2007). For uncertainty in a prominent labor monopsony case, see *Le v Zuffa, LLC*, 216 F Supp 3d 1154, 1163 (D Nev 2016) ("[R]eduction of competition does not invoke the Sherman Act until it harms consumer welfare."), quoting *Rebel Oil Co v Atlantic Richfield Co*, 51 F3d 1421, 1433 (9th Cir 1995).

[65] 802 F3d 1049 (9th Cir 2015).

[66] Id at 1054–55.

[67] 15 USC §§ 1–7.

[68] See *O'Bannon*, 802 F3d at 1079.

(fan) demand for college sports—and the need to integrate academics and athletics to improve education quality.[69] While the Ninth Circuit found the rules had anticompetitive effects—preventing colleges from competing for recruits through compensation—it concluded that the rules "serve[d] the [ ] procompetitive purposes identified."[70] The court thus viewed the benefits of the NCAA's marketing college sports to downstream consumers as trumping harms to student-athletes.

Courts and enforcement agencies have also taken employers' procompetitive justifications seriously in vertical franchise agreements.[71] When fast-food franchisors like McDonald's required franchisees to include no-poach and noncompete provisions in employment contracts, the DOJ and state attorneys general sued.[72] While most cases settled and franchisors agreed to remove the relevant provisions, the DOJ clearly signaled it would not view their use as per se unlawful. Instead, in a Statement of Interest submitted in ongoing litigation, it said no-poach provisions "between labor-market competitors . . . are per se unlawful . . . *unless* they are *reasonably necessary* to a separate, legitimate business transaction or collaboration between the companies, in which case the rule of reason applies. The rule of reason also applies to no-poach agreements between non-competitors."[73] Even a quick-look analysis was not enough. Further, the DOJ stated that "[m]ost franchisor-franchisee restraints are subject to the rule of reason" as vertical restraints, and hub-and-spoke franchise conspiracies—in which a franchisor coordinates agreements between franchisees—were subject to rule-of-reason analysis under the ancillary restraints doctrine.[74]

What procompetitive consumer benefits could employers raise to trump anticompetitive worker harm? Employers' vertical agreements, the DOJ argued, while restraining intrabrand competition, may benefit *interbrand* competition "'by allowing the

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69 See id at 1058–60.

70 Id at 1073.

71 See, for example, *Deslandes*, 2018 WL 3105955 at *7 (holding per se rule inapplicable because horizontal restraint "*ancillary* to franchise agreements" and ancillary "no-hire agreements . . . can have procompetitive effects") (emphasis added), citing *Eichorn*, 248 F3d at 144.

72 See, for example, Rachel Abrams, *Why Aren't Paychecks Growing? A Burger-Joint Clause Offers a Clue* (NY Times, Sept 27, 2017), archived at https://perma.cc/2BXB-2EL5.

73 Corrected Statement of Interest of the United States of America, *Stigar v Dough Dough, Inc*, No 2:18-cv-00244, *8–9 (ED Wash filed Mar 8, 2019) (Stigar Statement of Interest), available at https://perma.cc/3VYS-56GF (emphasis added).

74 See id at *11, 13.

manufacturer to achieve certain efficiencies in the distribution of his products' and . . . 'to compete more effectively against other manufacturers.'"[75] Further, under ancillary-restraints doctrine, they may be reasonably necessary to legitimate franchise collaboration.[76] Outside employment restraints, traditional antitrust justifications for exclusive dealing focus on additional efficiencies: preventing free-riding and hold-up problems; incentivizing promotional efforts, training, and employee assistance; enabling long-term planning; allocating limited resources; preserving confidentiality; and overcoming branding and reputation imbalances.[77] The Government's position is consistent with allowing no-poach and noncompete provisions if included in joint venture or merger agreements. Thus, the courts and the DOJ have moved away from applying the per se rule to anything but naked employer wage-fixing, and their evaluation of defenses credited in ancillary restraints and vertical agreements cases does not bode well for labor-antitrust advocates.

Courts have also refused to hold monopsonists liable under Section 2 of the Sherman Act for harm to upstream sellers without convincing proof of consumer harm. For example, in a foundational monopsony case—*Weyerhaeuser Co v Ross-Simmons Hardwood Lumber Co*[78]—the Supreme Court found no violation when a plaintiff did not show a dangerous probability that monopsonist Weyerhaeuser could recoup from alleged predatory bidding on a key input by raising prices downstream.[79] Importantly, the Court viewed predatory bidding as presenting "less of a direct threat of consumer harm than predatory pricing. . . . [Because it] could succeed with little or no effect on consumer prices[ ] a predatory bidder does not necessarily rely on raising prices in the output market to recoup its losses."[80] The Court thus implicitly rejected the premise that exercising monopsony power necessarily harms downstream consumers as well as monopsonist suppliers.

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75 Id at *12, 16–17, quoting *Continental T.V., Inc v GTE Sylvania, Inc*, 433 US 36, 54–55 (1977).

76 See Stigar Statement of Interest at *16 (cited in note 73).

77 See Bork, *Antitrust Paradox* at 299–309 (cited in note 5).

78 549 US 312 (2007).

79 See id at 325–26.

80 Id at 324.

Subsequent monopsony cases also require worker plaintiffs to allege consumer welfare harms to survive a motion to dismiss, even when worker harm from wage suppression is clearly alleged.[81]

Finally, courts have prioritized consumer over worker welfare in merger review, and while the agencies have signaled their commitment to reviewing labor-market effects in future reviews, they have traditionally viewed reduced labor costs as merger-specific efficiencies.[82] While some argue the consumer welfare standard is inadequate to prevent anticompetitive harms from mergers in labor markets, most presume that mergers that increase monopsony power, leading to labor input reduction, will reduce outputs and harm consumers.[83] The case law has not supported that presumption. First, courts have upheld no-poaching and noncompete agreements executed in mergers when employers showed they were conducive to increasing output, quality control, protecting competitively sensitive information, incentivizing training and assistance, or preventing free riding.[84] In *Eichorn v AT&T Corp*,[85] the Third Circuit found a no-hire agreement precluding a purchasing target's employees from seeking employment at AT&T affiliates was not "executed for the improper purpose of restraining trade and the cost of labor" but was intended

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81 See, for example, *Zuffa*, 216 F Supp 3d at 1163. Employers elsewhere deployed *Ohio v American Express Co*, 138 S Ct 2274 (2018) (*AmEx*), as precedent for the proposition that it is plaintiffs' burden to demonstrate employer market power in *both* labor and product markets. See *In re National Collegiate Athletic Association Athletic Grant-in-Aid Cap Antitrust Litigation*, 2018 WL 4241981, *3 (ND Cal) (rejecting employers' argument that *AmEx* required reevaluation of prior market definition); Defendant Zuffa LLC's Motion for Summary Judgment, *Le v Zuffa LLC*, No 2:15-cv-01045, *16 (D Nev filed July 30, 2018) (citing *AmEx* in challenge to plaintiffs' market definition).

82 See, for example, Department of Justice and Federal Trade Commission, *Horizontal Merger Guidelines* § V.1.A (1982), archived at https://perma.cc/A3TD-XZE2; Department of Justice and Federal Trade Commission, *Horizontal Merger Guidelines* § 3.5 (1984), archived at https://perma.cc/N5ML-8QAJ; Department of Justice and Federal Trade Commission, *Horizontal Merger Guidelines* § 4 (1992), archived at https://perma.cc/3UE5-G2ZA; Department of Justice and Federal Trade Commission, *Horizontal Merger Guidelines* § 4 (1997), archived at https://perma.cc/MXZ6-5UUT; *Horizontal Merger Guidelines* at *29–31 (cited in note 11); David Scheffman, Malcolm Coate, and Louis Silvia, *20 Years of Merger Guidelines Enforcement at the FTC: an Economic Perspective* 47–48 (2002). For the FTC's new stance, see *Antitrust Enforcement Hearing* at 31 (cited in note 57).

83 Compare, for example, Abdela and Steinbaum, *Labor Market Impact of the Proposed Sprint–T-Mobile Merger* at *21 (cited in note 38), with Marinescu and Hovenkamp, 94 Ind L J at 1038–40 (cited in note 2).

84 See, for example, *Eichorn*, 248 F3d at 146 (approving a no-hire arrangement because its "primary purpose" was "to ensure . . . the purchaser of [a subsidiary] could retain the skilled services of [its] employees").

85 248 F3d 131 (3d Cir 2001).

"to ensure the successful sale" of the merging party, which "required workforce continuity": "Any restraint . . . was incidental to the effective sale."[86] The court cited a long history, dating from the 1899 *Addyston Pipe & Steel Co v United States*[87] decision, of "recogniz[ing] that covenants not to compete are not violations of § 1 of the Sherman Act," characterizing them as "ancillary restraints."[88] Other courts are in accord.[89] Finally, while the Merger Guidelines state that benefits premised on reductions in competition are not cognizable, the FTC has argued in court that lower input prices passed through to consumers as decreased prices are procompetitive.[90]

2. Benefiting workers, harming consumers.

Courts also find that when labor market restraints benefit workers and not consumers, the consumer welfare standard trumps and the restraint violates the antitrust laws. Courts have not only established carve-outs from the application of per se illegality to worker combinations, but they also generously apply the rule of reason to favor consumers over workers, particularly in the context of independent contractor organizing and professional associations.[91] For example, in *National Society of Professional Engineers v United States*,[92] the Supreme Court held that the Society's amendment to its canon of ethics prohibiting engineers from submitting competitive bids to ensure competition on quality violated Section 1.[93] Even though the petitioners justified the restraint as a public safety benefit to consumers, the Court held it unreasonable because it "prevent[ed] [ ] customers from making price comparisons."[94] Similarly, when a dentists' association restricted advertisements about the quality of dental services, the Supreme Court held a more searching rule-of-reason inquiry was

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86 Id at 146.

87 175 US 211 (1899).

88 *Eichorn*, 248 F3d at 145.

89 See, for example, *United States v Empire Gas Corp*, 537 F2d 296, 308 (8th Cir 1976); *Lektro-Vend Corp v Vendo Corp*, 500 F Supp 332, 351 (ND Ill 1980).

90 See *Horizontal Merger Guidelines* at *29–31 (cited in note 11); Statement of the Federal Trade Commission, *In re Caremark Rx Inc/AdvancePCS*, File No 031 0239, *2–3 (Feb 11, 2014), archived at https://perma.cc/4SWD-GQYQ; Hemphill and Rose, 127 Yale L J at 2105–09 (cited in note 37).

91 See Sanjukta M. Paul, *The Enduring Ambiguities of Antitrust Liability for Worker Collective Action*, 47 Loyola U Chi L J 969, 1030–33 (2016) (collecting cases).

92 435 US 679 (1978).

93 See id at 694–95.

94 Id at 695.

required to determine whether the restriction harmed consumers.[95] The Court distinguished professional association's restraints from business restraints because of "[t]he public service aspect, and other features of the professions," but the ultimate question was whether any harm to competition would "be outweighed by gains to consumer information."[96] Along with precedent subjecting information-sharing agreements to the rule of reason, this case law would condemn and (at least) chill independent contractors from forming joint ventures to share wage and benefit information by subjecting such joint ventures to searching inquiry about consumer harms.[97]

Workers thus confront roadblocks in labor-antitrust enforcement, in part because antitrust is a double-edged sword that stops workers from coordinating.[98] Workers will have to convince agencies and the courts to adopt a kind of selective enforcement in cases eliciting procompetitive benefits from labor market restraints: If and when workers suffer from such a restraint but consumers benefit, labor antitrust should still find employers liable. But when workers benefit and consumers lose from a restraint, labor antitrust should look the other way. At the outer limit, when workers or independent contractors achieve industry-wide agreements for higher pay and wealth-transferring profit-sharing arrangements, labor-antitrust enforcement will not benefit them. But there is no defined limit within the literature or current doctrine for when enforcement should be abandoned.

C. Regulatory Arbitrage in Labor Markets

A second roadblock workers face is employers' *Copperweld* immunity defense from antitrust enforcement, which bars antitrust claims when firms are viewed as members of a single corporate family (the "single-firm defense").[99] Employers can claim immunity even when they are deemed separate "employers" under

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95 See *California Dental Association v Federal Trade Commission*, 526 US 756, 759, 781 (1999).

96 Id at 775, 771 n 10, quoting *Goldfarb v Virginia State Bar*, 421 US 773, 788–89 & n 17 (1975).

97 For information-sharing agreements and the rule of reason, see, for example, *United States v Citizens & Southern National Bank*, 422 US 86, 112–13, 143 (1975).

98 See note 81; Hiba Hafiz, *Picketing in the New Economy*, 39 Cardozo L Rev 1845, 1882–92 (2018).

99 See *Copperweld Corp v Independence Tube Corp*, 467 US 752, 767–69 (1984).

labor law, a form of regulatory arbitrage.[100] Since the statutory ban on hiring economists at the National Labor Relations Board (NLRB), labor policy and doctrinal developments have evolved through judges' common-law elucidations of master-servant control rather than through social-scientific understandings of employers' power over price.[101] Thus, if employers collude or vertically restrain labor-market competition on wages, that has no impact on agencies' or courts' determination of whether the colluding or restraining party counts as a "joint employer" with duties and obligations to collectively bargain under labor law. Employers have used vertical disintegration—outsourcing, subcontracting, franchising, and other arrangements—to immunize themselves from collective-bargaining obligations, liability, and compliance costs as "joint employers." And labor law has prohibited workers from striking and otherwise challenging entities that do not directly employ them, even if they have economic power to set their wages and determine their working conditions. Combined, employers' immunity—and the corporate structures and collusion that facilitate it—cost workers in lower pay and increased coordination burdens when they seek to challenge multi-employer or industry-wide wage suppression.

Employers are on the hook for both labor and antitrust violations only if a monopsonist or indirect employer is found to artificially suppress workers' wages and also meets the joint-employer requirements under labor law. While the NLRA provides no clear definition of "employer," the Board has interpreted the scope of "employer" based on a "right to control" the means or manner of an employee's work and terms of employment. Under the current *Browning-Ferris* joint-employer test, "employer" status extends to those that "share or codetermine those matters governing the essential terms and conditions of employment" with direct employers and does not require the exercise of direct control; "control exercised indirectly—such as through an intermediary" may be

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100 See, for example, Sanjukta Paul, *Antitrust as Allocator of Coordination Rights*, 67 UCLA L Rev *17–24 (forthcoming 2020) (on file with author). See generally, for example, Marshall Steinbaum, *Antitrust, the Gig Economy, and Labor Market Power*, 82 L & Contemp Probs 45 (2019).

101 See Hiba Hafiz, *Economic Analysis of Labor Regulation*, 2017 Wis L Rev 1115, 1119–40; Charlotte Garden, *Toward Politically Stable NLRB Lawmaking: Rulemaking vs. Adjudication*, 64 Emory L J 1469, 1475 n 23 (2015); Catherine L. Fisk and Deborah C. Malamud, *The NLRB in Administrative Law Exile: Problems with Its Structure and Function and Suggestions for Reform*, 58 Duke L J 2013, 2045–49 (2009).

enough.[102] The NLRB recently issued a proposed rule that would require putative joint employers to "possess and actually exercise substantial direct and immediate control over the employees' essential terms and conditions of employment in a manner that is not limited and routine," but the rule is not yet final.[103] While the NLRB or the courts may extend joint-employer status to colluding employers or franchisors that impose no-poaching or noncompete agreements under the *Browning-Ferris* test, no case law has explicitly addressed joint-employer status in those settings and existing case law has not been promising. Even when building owners, managers, and maintenance contractors formed a trade association with subcontracted janitorial firms to strategize against janitors' unionization and contributed to a joint strike fund to help janitorial firms ride out strikes, they were not deemed "joint employers."[104]

Employers can thus evade *both* labor and antitrust liability in a number of ways. First, independent contractors, domestic workers, and agricultural workers are excluded from the NLRA's coverage, so any employer restraints in their labor markets not found to violate the antitrust laws will leave those workers doubly unprotected. Second, for NLRA-protected workers, the NLRB or the courts could find that—under either the current *Browning-Ferris* test or the NLRB's new proposed definition—colluding or conspiring employers are not joint employers under labor law, and those employers could also be off the hook under antitrust law if: (1) they are vindicated through a single-firm defense, or (2) they are deemed separate firms but their agreement survives quick-look or rule-of-reason analysis.

On the joint-employer determination, because labor law's control test is orthogonal to the elements of Section 1, the NLRB and the courts do not focus on power over price. Instead, while determining worker pay, tenure, benefits, and the method of payment are *indicia* of control, the analysis is broader, considering: the ultimate authority to hire, fire, discipline, direct work, inspect

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[102] *Browning-Ferris Industries of California, Inc*, 362 NLRB 1599, 1600 (2015). See also *Browning-Ferris Industries of California, Inc v NLRB*, 911 F3d 1195, 1216–22 (DC Cir 2018).

[103] NLRB, Notice of Proposed Rulemaking, The Standard for Determining Joint-Employer Status, 83 Fed Reg 46681, 46686 (2018).

[104] See *Service Employees International Union, Local 525, AFL-CIO, and General Maintenance Services Co*, 329 NLRB 638, 638–42 (1999).

and monitor work, and control scheduling and the number of employees.[105] The Board and the courts have rejected joint-employer claims in a range of settings in the fissured economy, including when, for example, overseas plaintiffs claimed Wal-Mart was a joint employer with local employers it contracted with for goods production, but Wal-Mart only contracted with those factories regarding prices, product quality, and materials used.[106] They have also rejected cost-plus arrangements as automatically rendering contracting clients "employers" of vendors' employees.[107] Franchisors have been successful in defeating joint-employer claims by franchisees' employees, but the new *Browning-Ferris* test has rarely been applied due to appeals and the Trump NLRB's proposed rulemaking.[108]

The same firms that escape labor-law obligations could rely on the *Copperweld*, or single-firm, defense to claim they are unable to "conspire" on labor-market restraints because they are a single entity. *Copperweld* is traditionally applied to agreements between parents and wholly or partially owned subsidiaries, but it has also "been extended to insulate some coordination between franchisors and franchisees, on the ground that franchisors exercise control over franchisees and they share common economic goals."[109] When firms fail in asserting a *Copperweld* defense, they may, as discussed above, rely on a range of procompetitive justifications under the rule of reason to evade antitrust liability. Because the types of restraints that dominate the fissured workplace are vertical restraints necessary for indirect employers' ability to control workers, workers will remain most vulnerable in these settings.

D. Limitations of New Labor-Antitrust Scholarship

In sum, workers seeking to use antitrust law to challenge employer buyer power in the new era of labor antitrust will face difficulties. At the same time, they will expose themselves to potential antitrust liability if they seek to coordinate to counter that

[105] See *Browning-Ferris*, 362 NLRB at 1611–12; Restatement (Second) of Agency § 220(2) (1958).

[106] See, for example, *Doe I v Wal-Mart Stores, Inc*, 572 F3d 677, 683 (9th Cir 2009).

[107] See, for example, *Pulitzer Publishing Co v NLRB*, 618 F2d 1275, 1279 (8th Cir 1980).

[108] See Robert Iafolla, *Joint Employment Test's Bark May Be Worse Than Its Bite* (Bloomberg Law, Oct 2, 2018), archived at https://perma.cc/87WL-4H6W; Andrew Elmore, *Franchise Regulation for the Fissured Economy*, 86 Geo Wash L Rev 907, 932–39 (2018) (collecting cases).

[109] Paul, 67 UCLA L Rev at *45 (cited in note 100).

power. Each of these challenges stems from the courts' inevitable reckoning with the consumer welfare standard. With employer competitors increasingly aware of crackdowns on naked wage-fixing and successfully focusing courts' attention on downstream effects by categorizing labor-market restraints as ancillary, the relevance of the *per se* rule to labor market restraints will likely recede further over time.

And current proposals to jettison the consumer welfare standard in labor antitrust fail to overcome labor antitrust's paradox. The proposed effective competition standard—while placing the burden in merger reviews on the merging parties to prove their transaction will not harm competition and mandating antitrust enforcers to peruse upstream harms[110]—does not resolve the question of how to weigh harms to workers and consumers if they conflict. The "protection of competition" standard fares no better. While it may draw courts' and enforcers' attention to "protecting the competitive process, as opposed to trying to achieve welfare outcomes that judges and enforcers are ill-equipped to measure," it does not resolve the question of how to handle harms to labor market competition that do not result in harm to competition downstream.[111] This is particularly tricky in fissured workplaces where employer wage discrimination may or may not harm the competitive process—far from "suppress[ing] or even destroy[ing] competition" in labor markets, fissured employment may make labor markets more competitive while nevertheless harming workers.[112]

These intractable challenges suggest an alternative solution to protecting workers while maintaining the coherence and integrity of antitrust law: regulatory sharing. Regulatory sharing would supplement existing labor law by creating an additional system of substantive presumptions and affirmative defenses workers can deploy under labor law when employer buyer power or anticompetitive conduct is demonstrated in antitrust investigations, enforcement actions, or private litigation. Such a solution is necessary to concentrate antitrust enforcement on consumer harm from employers' labor-market restraints while also

110 See Abdela and Steinbaum, *Labor Market Impact of the Proposed Sprint–T-Mobile Merger* at *21 (cited in note 38); Steinbaum and Stucke, *Effective Competition Standard* at *29–40 (cited in note 43).

111 Wu, *After Consumer Welfare* at *2 (cited in note 49).

112 Id, quoting *Chicago Board of Trade v United States*, 246 US 231, 238 (1918).

strengthening labor-law protections and the role of administrative agencies and expertise in enforcing them. Regulatory sharing would prevent arbitrage between regulatory regimes that employers exploit to avoid liability and establish a firm role for labor agencies in merger review.

III. Proposal for Regulatory Sharing

Workers facing labor antitrust's limitations and regulatory arbitrage would dramatically benefit from a structural approach of mutually reinforcing regulatory regimes under labor and antitrust law. Separate but integrated labor-market regulation under the two regimes is an ideal solution to labor antitrust's paradox. Regulatory sharing could also revive critical labor market institutions necessary for sustained checks on employer buyer power that may reduce costly antitrust enforcement.

A. Consumer Welfare / Worker Welfare

To overcome conflicts between competing welfare standards and administrability challenges of non-welfare-based antitrust approaches, this Essay proposes a system of regulatory sharing in which antitrust agency enforcement and labor-antitrust adjudication would concentrate on consumer welfare effects when worker and consumer welfare *conflict*; but antitrust agency investigations, as well as agency and judicial findings, would trigger substantive presumptions and defenses under labor law as a supplement to existing protections. It also proposes integrating labor agencies into the antitrust agencies' merger review.

Separate but joint enforcement has two main advantages. First, it preserves coherence in both the antitrust and labor regulatory regimes: regulated parties and the courts would be clear on the standards governing antitrust liability, and those standards would be more administrable and predictable. Second, while antitrust regulation would concentrate on maximizing output to benefit consumers when worker and consumer welfare conflict, labor regulation would step in to achieve the separate but clear NLRA policy goals: equal bargaining power between employers and employees to ensure against employee-employer wealth transfers and establish countervailing power from the "shop floor" that strengthens workers' voices and participation.[113]

B. Regulatory Sharing Between Antitrust and Labor Law

Regulatory sharing between antitrust and labor law is necessary to ensure against employer arbitrage enabled by antitrust law's ambiguous welfare standards and the judiciary's historical favoring of consumer welfare over worker welfare. Establishing a network of labor antitrust triggers for labor rights enforcement, shared merger enforcement between the antitrust and labor agencies, and substantive law presumptions and affirmative defenses under labor law generated by labor-antitrust findings avoids the pitfalls of underenforcement in labor-market regulation.

1. Labor antitrust triggers and shared merger enforcement.

Labor-antitrust actions should apply a consumer welfare standard to determine antitrust liability. Yet when a court finds employers' conduct beneficial to consumers but harmful to workers in either Section 1 or Section 2 cases, that would trigger a "red flag" establishing substantive legal presumptions and affirmative defenses to workers under labor law.[114] If plaintiff-enforcers make a prima facie showing of employers' unlawful agreements or monopsony power, or power to set wages, this would also trigger a "red flag." The red flag would issue before defendants have an opportunity to rebut "by showing . . . no control over wages," as others propose,[115] because labor markets are naturally monopsonistic and such a rebuttal should not be relevant for labor-law inquiries. It will likely be difficult and costly for plaintiffs to disaggregate employers' market power from search frictions, information asymmetries, job differentiation, heterogeneous tastes, job-lock, and other market failures that favor employers' leverage over

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[113] On the value of worker voice, see generally, for example, Richard B. Freeman, *The Exit-Voice Tradeoff in the Labor Market: Unionism, Job Tenure, Quits, and Separations*, 44 Q J Econ 643 (1980).

[114] I develop a proposal for antitrust and labor interagency coordination through information-sharing and enforcement in Hiba Hafiz, *Structural Labor Regulation* (unpublished manuscript, 2019) (on file with author).

[115] Marinescu and Posner, *Proposal to Enhance Antitrust Protection* at *12 (cited in note 36).

workers.[116] Thus, while an employer may avoid *antitrust* liability by rebutting evidence of its monopsony power, the *source* of that power is less relevant in the labor and employment context; if it exists, workers should be entitled to substantive labor-law presumptions and affirmative defenses.

If employers' monopsony power is sufficiently alleged in a Section 2 antitrust case, plaintiff antitrust enforcers would then need to show anticompetitive conduct: unlawful acquisition or maintenance of monopsony power (through mergers-to-monopsony, wage-fixing agreements, no-poaching agreements, or other forms of exclusionary conduct and foreclosure), attempted monopsonization, or conspiracy to monopsonize. Other scholars suggest that liability-triggering conduct under antitrust law should extend beyond those traditionally associated with reducing competition to also include work law violations: the use of broad noncompete clauses or class-action waivers in employment contracts, unfair labor practices under the NLRA, independent-contractor misclassification, and restrictive wage transparency policies.[117] However, there are a number of reasons to relegate consideration of this kind of activity to labor agencies when worker and consumer welfare conflict. First, not all such conduct is harmful to labor-market competition per se, but is instead more indicative of employers' monopsony power (and, concomitantly, workers' relative bargaining leverage) and should be analyzed as such, contributing to the issuance of that first-stage monopsony power "red flag." Second, labor agencies have more expertise, data, and remedial mechanisms to assess impacts of employment terms and deploy shop-floor solutions, most certainly in tandem with antitrust enforcement; inviting antitrust agencies and courts to determine "reasonable terms of employment" without labor agencies' expertise may not be smart labor policy. Thus, any work-law violations should be evidence workers can use to justify the applicability of substantive presumptions and defenses in relevant adjudications under labor law discussed below.

Antitrust and labor agencies could also conduct joint merger review. Under the 2010 Merger Guidelines, antitrust agencies must review the impacts of a proposed merger on labor-market

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[116] See, for example, Berger, Herkenhoff, and Mongey, *Labor Market Power* at *2 (cited in note 37) (finding substantial employer monopsony power even in unconcentrated labor markets).

[117] See Marinescu and Posner, *Proposal to Enhance Antitrust Protection* at *14 (cited in note 36).

concentration.[118] Under a structural approach to labor-market regulation, if the antitrust agencies identify and categorize post-merger labor-market concentration levels as "moderately" or "highly concentrated,"[119] that data ought to be shared with the NLRB and the Department of Labor, and their sign-off would be required.[120] Concurrent jurisdiction over merger review is not uncommon. In fact, interagency jurisdiction and/or cooperation on merger review in the telecommunications, energy, railroad, banking, shipping, airline, and agricultural industries spans the spectrum of more and less aggressive intervention authority by agencies outside the DOJ and FTC.[121]

Labor agencies could provide critical data on and analysis of exacerbating factors that affect the significance of given concentration levels when evaluating a merger's labor-market effects. The agencies could provide data and analysis of: industry-wide wage rates in the relevant market, including any changes resulting from prior mergers; the use of noncompete or nonsolicitation clauses in the industry; union density; the existence of salary transparency provisions in collective bargaining agreements in the industry; contractual restrictions on wage transparency; records of enforcement actions in the industry for labor and employment violations (including unfair labor practices, wage-and-hour violations, violations of health and safety standards, violations of antidiscrimination law); internal and external labor-market statistics (how much firms rely on employees or contracted-for labor inputs through subcontracting, temporary agencies, and independent contractors, and assessment of any wage discrimination); history of misclassification actions for misclassifying employees as independent contractors; and the use of class-action waivers in employment contracts. This information is critical for revealing merged employers' ability to profitably reduce workers' wages and would more accurately assess the impacts of post-merger concentration.

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[118] See *Horizontal Merger Guidelines* at § 12 (cited in note 11).

[119] Id at § 5.3.

[120] This regulatory convergence could occur through Memoranda of Understanding. For more detail on this proposal, see generally Hiba Hafiz, *Interagency Merger Review in Labor Markets*, 95 Chi Kent L Rev (forthcoming 2019) (on file with author).

[121] See, for example, Communications Act of 1934, 47 USC §§ 214, 310(d); Federal Power Act, 16 USC § 824(a)–(b) (1920); ICC Termination Act of 1995, 49 USC §§ 1321–28; 49 CFR § 1180 (Surface Transportation Board railroad merger regulations); Bank Holding Company Act of 1956, 12 USC § 1842(a); Federal Deposit Insurance Act, 12 USC § 1828(c) (1950); Ocean Shipping Reform Act of 1998, 46 USC § 1701 et seq.

Efficiency defenses would also be independently reviewed: the antitrust agencies would focus on consumer welfare effects while the labor agencies would focus on worker welfare effects. Worker welfare effects would be assessed based on a broader set of criteria incorporating the expertise of labor economists, behavioral economists, sociologists of work, and human resources and psychological experts within the labor agencies to better evaluate how estimated post-merger compensation would match their assessment of productivity-maximizing wages. These experts could compare how post-merger compensation accords with: (1) internal labor-market wages and life-cycle earnings within a firm; (2) union premiums within the industry; (3) fairness expectation effects; and (4) merger-specific workplace realities and productivity effects.[122] This analysis would be integrated into evaluating post-merger effects on workers' bargaining leverage against their merged employer.[123] Finally, labor agency macroeconomic experts could estimate the impact of post-merger concentration on labor's share of income within the relevant sector.

Labor and antitrust agency approval would tolerate differences in agency standards for evaluating mergers, on whom burdens of proof fall, and proper applicable procedures, much like concurrent merger review in other jointly regulated industries. While the DOJ would focus on the merger's competitive effects, the labor agencies could apply a broader "public interest" standard. Likewise, while the DOJ would bear the burden of proof for establishing that a merger should be blocked,[124] the merging parties would bear the burden of establishing that the labor agencies should approve the merger.[125] The labor agencies, like the FCC, would assess whether the proposed merger accords with work law and agency rules and whether it could result in public interest harms by substantially frustrating or impairing the objectives or implementation of work law, including ensuring equal bargaining

[122] For robust economic analysis, Congress would need to repeal the current ban on NLRB economist hiring: 29 USC § 154(a). See Hafiz, 2017 Wis L Rev at 1119–29 (cited in note 101).

[123] For buy-side harms on bargaining leverage, see Hemphill and Rose, 127 Yale L J at 2093–2105 (cited in note 37).

[124] See, for example, *Federal Trade Commission v H.J. Heinz Co*, 246 F3d 708, 715 (DC Cir 2001).

[125] The Communications Act places the burden on FCC merger applicants to prove by a preponderance of the evidence that the proposed merger serves the "public interest, convenience, and necessity." 47 USC § 310(d).

power between employers and employees. They would also employ a balancing test weighing any public-interest harms of the merger against potential public-interest benefits.[126] Finally, like the FCC and Federal Energy Regulation Commission, the labor agencies could condition mergers on appropriate remedies to meet a public-interest standard, including structural or behavioral remedies.[127]

2. Substantive law integration: antitrust and labor law.

While worker welfare cannot be a coherent goal of antitrust when it conflicts with consumer welfare, Congress has mandated worker protections under other laws. And labor law should be deeply informed by labor-antitrust enforcement: to tailor rights and remedies to the structural realities of labor markets; to deter unlawful employer monopsony and collusion; and to reinforce the remedial effects of labor-antitrust enforcement. Thus, as a supplement to existing work-law enforcement, this Section outlines a system of legal presumptions and affirmative defenses that could be integrated into work law cases based on labor-antitrust investigations and enforcement. A single system can prevent regulatory arbitrage and limit the creation of buyer power in the first instance. This is a tremendous benefit over ex post regulation when considering enforcement costs and the costs of employer buyer power in labor markets and the larger economy.[128] A more unified approach to labor-market regulation could allow for cross-pollination between substantive rules and adapt remedies to coordinate achievement of regulatory goals.

As discussed above, "red flags" punctuating developments in labor-antitrust investigations and enforcement would trigger substantive presumptions and affirmative defenses under the NLRA that would supplement existing labor-law protections.

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[126] For an FCC analog, see, for example, *In the Matter of Applications of AT&T Inc and DIRECTV*, 30 FCC 9131, 9134–35 (2015).

[127] See, for example, *MPS Merchant Services, Inc v Federal Energy Regulation Commission*, 836 F3d 1155, 1165 (9th Cir 2016); Federal Energy Regulatory Commission, Inquiry Concerning the Commission's Merger Policy Under the Federal Power Act, 61 Fed Reg 68595, 68610 (1996).

[128] See, for example, Carstensen, *Competition Policy* at 274 (cited in note 43).

Because organized workers are a countervailing power to monopsonistic employers,[129] when a court finds employers either have monopsony power to artificially suppress wages or have reached agreements restraining labor-market inputs, workers would be entitled to these presumptions and defenses. First, when such findings are made, workers should be entitled to a default rule of union bargaining,[130] or if a union is in place, a Board order to mandate collective bargaining under *NLRB v Gissel Packing Co.*[131] If workers have formed a union and their employers refuse to bargain in good faith, workers should also be entitled to a *Gissel* bargaining order and protections to engage in concerted activity under the NLRA.[132] Analysis of whether an employer is bargaining in good faith could be informed by the employer's buyer power and social-scientific data on industry-specific, productivity-maximizing wages. Similarly, analysis of, and remedial options for, whether employers commit unfair labor practices that infringe workers' right to organize, bargain collectively, and strike could be informed by monopsony-power determinations and the scope of worker's outside options.

Substantive labor-law presumptions and defenses could also extend to workers' right to engage in concerted activity against colluding employers by classifying those employers as joint employers with obligations to collectively bargain with workers. When employers have monopsony power within labor supply chains or reach wage-fixing, no-poaching agreements, or noncompete agreements enabling their exercise of buyer power over workers' wages, workers should be entitled to a rebuttable presumption of entitlement to a multifirm or sectoral bargaining unit obligating sectoral bargaining. In such cases, bargaining unit definitions should expand to encompass employers with buyer power to the extent workers' concerted activity against a single employer would be ineffective. Because joint ownership among

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129 See Efraim Benmelech, Nittai Bergman, and Hyunseob Kim, *Strong Employers and Weak Employees: How Does Employer Concentration Affect Wages?* *4 (National Bureau of Economic Research Working Paper No 24307, Feb 2018), archived at https://perma.cc/24TD-3EVD.

130 For establishing a union default rule, see Mark Barenberg, *Democracy and Domination in the Law of Workplace Cooperation: From Bureaucratic to Flexible Production*, 94 Colum L Rev 753, 932–33 (1994). See also generally Benjamin I. Sachs, *Enabling Employee Choice: A Structural Approach to the Rules of Union Organizing*, 123 Harv L Rev 655 (2010).

131 395 US 575, 610–16 (1969).

132 29 USC §§ 157, 158(a)(5), 158(d).

employers offers deeper pockets to maintain insurmountable leverage over workers, making it nearly impossible for workers to successfully engage in concerted activity, the same presumption should apply to ensure restoration of equal bargaining power.[133] Further, NLRA-protected workers should be entitled to affirmative defenses for engaging in self-help and concerted activity that is currently prohibited, highly regulated, or subject to steep penalties, including secondary boycotts and strikes against monopsonistic or collusive employers. Additionally, employer buyer power should be integrated into the NLRB's analysis of whether to classify independent contractors as employees. To the extent buyer power is shown, independent contractors should be eligible for a rebuttable presumption of immunity from antitrust liability under the labor exemption to the antitrust laws to the extent they coordinate to demand higher wages and better working conditions.[134]

CONCLUSION

The critical turn in current antitrust policy and scholarship toward the problem of labor-market concentration, the natural asymmetries of power between employers and employees, and the broader wealth transfer and inequality effects of lax enforcement are motivated not only by the failures of the Chicago School's past assumptions, but also by a systemic collapse of labor and employment regulation more broadly. Sustainable solutions to the inefficiencies that pervade labor markets, and the democratic and political economy effects of enfeebled labor-market institutions and worker protections, ought to be one and the same. Integrating labor antitrust into labor-law enforcement is a crucial supplement to both its protections and its administrative deployment, offering a key intervention in the right direction.

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[133] On horizontal shareholding, see generally José Azar, Martin C. Schmalz, and Isabel Tecu, *Anticompetitive Effects of Common Ownership*, 73 J Fin 1513 (2018); Fiona Scott Morton and Herbert Hovenkamp, *Horizontal Shareholding and Antitrust Policy*, 127 Yale L J 2026 (2018). For anecdotal evidence of horizontal shareholding impacting union decisions to strike, see Suresh Naidu (@snaidunl), (Twitter, June 16, 2018), archived at https://perma.cc/TF5U-W262.

[134] Without the exemption, independent contractors are subject to treble damages for concerted refusal to deal with their "employer." See generally, for example, Sanjukta M. Paul, *Uber as For-Profit Hiring Hall: A Price-Fixing Paradox and Its Implications*, 38 Berkeley J Empl & Labor L 233 (2017) (collecting cases).

WHY HAS ANTITRUST LAW FAILED WORKERS?

Ioana Marinescu & Eric A. Posner†

In the last several years, economists have learned about an antitrust problem of vast scope. Far from approximating the conditions of perfect competition as long assumed, most labor markets are characterized by monopsony—meaning that employers pay workers less than their productivity because workers lack a credible threat to quit and find a higher-paying job in the same market. Yet while antitrust law regulates labor monopsony in the same way as it regulates monopoly on the product market side, antitrust litigation against employers is rare. We document both the magnitude of labor monopsony and the paucity of cases and argue that this "litigation gap" exists because antitrust case law, which has developed through product-side litigation, is poorly tailored to labor-side problems. We conclude with four proposals for reform of antitrust law so it can better deter labor monopsony.

† Marinescu is Assistant Professor, School of Social Policy & Practice, University of Pennsylvania, and a faculty research fellow at the National Bureau of Economic Research. Posner is Kirkland & Ellis Distinguished Service Professor, University of Chicago. Portions of this Article are drawn from a working paper. *See* Ioana Marinescu & Eric A. Posner, *A Proposal to Enhance Antitrust Protection Against Labor Market Monopsony* (Dec. 21, 2018) (Roosevelt Inst., Working Paper), https://rooseveltinstitute.org/wp-content/uploads/2019/01/RI_ProposalToEnhanceAntitrustProtection_workingpaper_11419-1.pdf [https://perma.cc/4DQZ-WAL2]. We thank participants at a University of Chicago Law School workshop, Hiba Hafiz and Randy Picker for valuable comments, and Carly Gibbons and Eugenia Lee for helpful research assistance.

Events over the last several years have drawn public attention to employers who have used their power over labor markets to suppress wages and control workers. In 2010, a group of Silicon Valley tech companies, including Apple and Google, settled a case brought against them by the Justice Department alleging that they had agreed not to poach each other's employees in violation of section 1 of the Sherman Act.[1] Then, in 2014, news that Jimmy John's, the sandwich chain, imposed covenants not to compete on their low-wage sandwich makers provoked a public outcry.[2] Two years later the company settled lawsuits brought by state attorneys general by agreeing to drop the noncompetes.[3] Around the same time, academic scholarship revealed that noncompetes were ubiquitous, even in the contracts of low-skill workers like the sandwich workers of Jimmy John's, despite being subject to strict review in the common law and generally thought to be appropriate for high-skill workers in limited circumstances.[4] A

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1 David Streitfeld, *Engineers Allege Hiring Collusion in Silicon Valley*, N.Y. TIMES (Feb. 28, 2014), https://www.nytimes.com/2014/03/01/technology/engineers-allege-hiring-collusion-in-silicon-valley.html [https://perma.cc/VGG7-526S].

2 Neil Irwin, *When the Guy Making Your Sandwich Has a Noncompete Clause*, N.Y. TIMES (Oct. 14, 2014), https://www.nytimes.com/2014/10/15/upshot/when-the-guy-making-your-sandwich-has-a-noncompete-clause.html?auth=login-email&login=email [https://perma.cc/ESB3-X4NP].

3 *E.g.*, Will Racke, *Jimmy John's Settles Non-Compete Lawsuit*, CHI. BUS. J. (Dec. 8, 2016, 12:04 PM), https://www.bizjournals.com/chicago/news/2016/12/08/jimmy-johns-settles-non-compete-lawsuit.html [https://perma.cc/MC6X-SB7U].

4 ALAN B. KRUEGER & ERIC A. POSNER, THE HAMILTON PROJECT, A PROPOSAL FOR PROTECTING LOW-INCOME WORKERS FROM MONOPSONY AND COLLUSION 7, 10 (2018), https://www.hamiltonproject.org/assets/files/protecting_low_income_workers_from_monopsony_collusion_krueger_posner_pp.pdf [https://perma.cc/T3JE-EM4U]; Evan Starr, J.J. Prescott & Norman Bishara, *Noncompetes in the U.S. Labor Force* 17–18 (U. Mich. L. & Econ., Research Paper No. 18-013, 2019), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2625714 [https://perma.cc/TV79-2DWF].

paper by two academics released in 2017 reported that numerous franchises imposed no-poaching clauses on franchisees;[5] a year later seven franchises, including McDonald's and Arby's, agreed to drop these clauses to settle a case brought by state attorneys general.[6] Meanwhile, the Obama administration issued a report warning of anticompetitive behavior by employers,[7] and the Justice Department warned human resource departments to avoid no-poaching arrangements.[8] The media kept up the drumbeat by reporting the ways that employers—using noncompetes, mergers, no-poaching agreements, and other anticompetitive devices—pushed down wages.[9]

These events coincided with the release of several academic papers that document statistically the pervasiveness of labor monopsony in the United States.[10] A labor monopsony exists

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5 Alan B. Krueger & Orley Ashenfelter, *Theory and Evidence on Employer Collusion in the Franchise Sector* 6 (Princeton Univ., Indus. Relations Section, Working Paper No. 614, 2017), https://dataspace.princeton.edu/jspui/bitstream/88435/dsp014f16c547g/3/614.pdf [https://perma.cc/6KKZ-R7B6].

6 Sean Higgins, *Corporations Targeted for Directing Franchise Hiring*, WASH. EXAMINER (July 24, 2018, 12:01 AM), https://www.washingtonexaminer.com/policy/economy/corporations-targeted-for-directing-franchise-hiring [https://perma.cc/D48D-JSNC].

7 *See* COUNCIL OF ECON. ADVISERS, BENEFITS OF COMPETITION AND INDICATORS OF MARKET POWER 2 (2016) https://obamawhitehouse.archives.gov/sites/default/files/page/files/20160414_cea_competition_issue_brief.pdf [https://perma.cc/4LTZ-2ESB].

8 U.S. DEP'T OF JUSTICE ANTITRUST DIV. & FED. TRADE COMM'N, ANTITRUST GUIDANCE FOR HUMAN RESOURCE PROFESSIONALS 3–4 (2016), https://www.justice.gov/atr/file/903511/download [https://perma.cc/MM56-XLCE].

9 *See* Miguel Helft, *Unwritten Code Rules Silicon Valley Hiring*, N.Y. TIMES: DEALBOOK (June 3, 2009), https://www.nytimes.com/2009/06/04/technology/companies/04trust.html [https://perma.cc/6CCA-MZ93]; Andrew Ross Sorkin, *Tech Firms May Find No-Poaching Pacts Costly*, N.Y. TIMES (Apr. 7, 2014, 8:54 PM), https://dealbook.nytimes.com/2014/04/07/tech-firms-may-find-no-poaching-pacts-costly/ [https://perma.cc/K6UY-T9PV]; *supra* notes 1–4, 6.

10 José Azar, Ioana Marinescu, Marshall Steinbaum & Bledi Taska, *Concentration in US Labor Markets: Evidence from Online Vacancy Data* 2, 4–7 (Nat'l Bureau of Econ. Research, Working Paper No. 24395, 2018), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3133344 [https://perma.cc/4LH7-DVFV]; Efraim Benmelech et al., *Strong Employers and Weak Employees: How Does Employer Concentration Affect Wages?* 1–2 (Nat'l Bureau of Econ. Research, Working Paper No. 24307, 2018), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3146679 [https://perma.cc/DN2P-CMGJ]; Brad Hershbein, Claudia Macaluso & Chen Yeh, Concentration in U.S. Local Labor Markets: Evidence from Vacancy and Employment Data 2 (Mar. 15, 2018) (unpublished manuscript), https://site.stanford.edu/sites/g/files/sbiybj8706/f/5166-concentration_in_u.s._local_labor_markets_evidence_from_vacancy_and_employment_data.pdf [https://perma.cc/7JL7-PE3L]; Yue Qiu & Aaron Sojourner, Labor-Market Concentration and Labor Compensation 4 (Jan. 7, 2019) (unpublished manuscript), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3312197 [https://perma.cc/QZ3J-FKCL].

when lack of competition in the labor market enables employers to suppress the wages of their workers.[11] At one time, economists assumed that labor markets were highly competitive.[12] If one imagines sandwich workers in a big city, for example, the immediate image that comes to mind is that of someone who could easily find another job if fired. That person could work at another restaurant, or a coffee shop, or in a warehouse, or as an Uber driver. Similarly, a lawyer can easily quit her law firm and join another. But the new research revealed that these assumptions were faulty.[13] In fact, most labor markets are not highly competitive.[14] Most labor markets are rural or semi-rural. Only a handful of employers cater to a thin population spread out over a large area.[15] Even in densely populated areas, various frictions, including noncompetition agreements, prevent workers from easily finding new jobs.[16] Taking advantage of these frictions, employers can pay below-competitive wages without worrying that they will lose employees to competitors. Some commentators argue that the high degree of labor monopsony may explain stagnant wages.[17]

Labor monopsony is regulated by the antitrust laws, just as the more familiar phenomenon of monopoly is. Indeed, from an economic standpoint, monopolization of product markets and monopsonization of labor markets pose exactly the same challenge to the economy—mispricing of resources (material or human), resulting in their underemployment, which both harms the economy and results in inequitable outcomes. Because nominally antitrust law applies to monopsony as well

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11 Suresh Naidu, Eric A. Posner & Glen Weyl, *Antitrust Remedies for Labor Market Power*, 132 HARV. L. REV. 536, 537 (2018).

12 *Id.* at 541–42; *see, e.g.*, DENNIS W. CARLTON & JEFFREY M. PERLOFF, MODERN INDUSTRIAL ORGANIZATION 108 (4th ed. 2005) ("Most labor economists believe there are few monopsonized labor markets . . . .").

13 Naidu, Posner & Weyl, *supra* note 11, at 542.

14 *Id.* at 537.

15 *See* Azar, Marinescu, Steinbaum & Taska, *supra* note 10, at 14.

16 *See infra* subpart I.A.

17 *See* Lydia DePillis, *Big Companies Used to Pay the Best Wages. Not Anymore*, CNN BUS. (Jan. 18, 2018, 12:51 PM), http://money.cnn.com/2018/01/18/news/economy/big-companies-wages/index.html [https://perma.cc/M4K9-FBR2]; Noam Scheiber & Ben Casselman, *Why Is Pay Lagging? Maybe Too Many Mergers in the Heartland*, N.Y. TIMES (Jan. 25, 2018), https://www.nytimes.com/2018/01/25/business/economy/mergers-worker-pay.html [https://perma.cc/ZD7Z-N5LD]; Mark Whitehouse, *U.S. Labor Markets Aren't Truly Free*, BLOOMBERG OPINION (Oct. 21, 2018, 8:00 AM), https://www.bloomberg.com/view/articles/2018-10-21/free-markets-could-make-workers-better-off [https://perma.cc/G3KR-4R7P].

as to monopoly,[18] one might think there would be as much litigation against employers for labor-market monopsonization as there has been against firms for violating antitrust law in the product market.

But the opposite is the case. The antitrust laws have rarely been used against employers by private litigants or the government.[19] And when they have been used—whether by private litigants or by the government—they have been used mostly against the most obvious forms of anticompetitive conduct, like no-poaching agreements.[20] Much under-the-radar activity has been unaddressed.

Our major goal in this Article is to draw attention to, and explain, this "litigation gap," the gap between the largeness of the labor monopsony problem and the smallness of the legal response. Building on earlier work,[21] we also offer four reform proposals. We propose more liberal standards for proving collusion under section 1 of the Sherman Act; stronger protections against monopsony under section 2; government review of the labor-market effects of mergers under section 7 of the Clayton Act; and a ban on arbitration clauses that prohibit class actions in employment contracts.

We write on a relatively clean slate. The law review literature contains some now-dated writing that was motivated by 1990s-era antitrust litigation against hospitals and sports leagues.[22] But because of the widespread background

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[18] As the Supreme Court has observed, "[t]he kinship between monopoly and monopsony suggests that similar legal standards should apply to claims of monopolization and to claims of monopsonization." Weyerhaeuser Co. v. Ross-Simmons Hardwood Lumber Co., 549 U.S. 312, 322 (2007). Long before, in Anderson v. Shipowners Ass'n of the Pacific Coast, 272 U.S. 359, 362–63 (1926), the Court recognized a claim by workers based on a no-poaching agreement. In recent years, many lower courts have recognized that the antitrust laws apply to labor monopsony. *See, e.g.*, O'Bannon v. Nat'l Collegiate Athletic Ass'n, 802 F.3d 1049, 1058, 1079 (9th Cir. 2015) (noting the district court's characterization of the market for college athletes as a monopsony and holding that NCAA regulations are subject to antitrust scrutiny under the rule of reason).

[19] Naidu, Posner & Weyl, *supra* note 11, at 570.

[20] *Id.* at 571.

[21] Marinescu & Posner, *supra* note †, at 2; Ioana Marinescu & Herbert Hovenkamp, *Anticompetitive Mergers in Labor Markets*, 94 IND. L.J. 1031, 1031 (2019); Naidu, Posner & Weyl, *supra* note 11.

[22] *See, e.g.*, John A. Litwinski, *Regulation of Labor Market Monopsony*, 22 BERKELEY J. EMP. & LAB. L. 49, 52 (2001) (arguing that "antitrust law should be extended to outlaw or regulate firms' abilities to exercise labor market monopsony power" by prohibiting such firms "from using their market power to buy labor below the price which would otherwise exist in a competitive labor buying market"); Jeff Miles, *The Nursing Shortage, Wage-Information Sharing Among Competing Hospitals, and the Antitrust Laws: The Nurse Wages Antitrust Litigation*, 7 HOUS. J. HEALTH L. & POL'Y 305, 306–07 (2007) (finding that collusion

assumption that labor markets are competitive, this litigation did not spur a more general discussion of the effectiveness of antitrust law for addressing labor monopsony. In the last year or so, a few articles have begun to come to grips with the latest economic research but have focused on relatively narrow aspects of it, such as mergers.[23] In this Article, we broaden the focus.

Our Article is also related to a recent surge in academic writing among antitrust scholars who argue for more robust antitrust enforcement.[24] This writing has emerged in the wake of economic research that shows that U.S. product markets have become significantly more concentrated over the last several decades, in part because of weak merger review by the U.S. government.[25] Yet while authors writing in the newly reinvigorated antitrust literature have proposed a range of novel reforms for strengthening antitrust law, they have ignored the problem of labor monopsony. Our approach focuses on the major victims of economic stagnation and widening inequality—the workers, especially lower-skill workers.

We start in Part I with a review of the theory of labor monopsony and the recent economic literature that documents

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among hospitals to prevent the wages they pay RNs from rising explains the RN-shortage phenomenon in some cities); Laura Alexander, Note, *Monopsony and the Consumer Harm Standard*, 95 GEO. L.J. 1611, 1633 (2007) (arguing that courts should recognize the legislative judgments inherent in the Sherman Act to resolve the problems of applying antitrust law to monopsony).

23 In addition to the articles cited in *supra* note 9, see Suresh Naidu & Eric A. Posner, Labor Monopsony and the Limits of the Law 7–8 (Oct. 14, 2018) (unpublished manuscript), https://irs.princeton.edu/sites/irs/files/naidu%20posner%20limits%20of%20law%20conference%20draft.pdf [https://perma.cc/93P9-WMYB]; *cf.* Clayton J. Masterman, Note, *The Customer Is Not Always Right: Balancing Worker and Customer Welfare in Antitrust Law*, 69 VAND. L. REV. 1387, 1389 (2016) (analyzing the court's forgiving tendency toward monopsonist conduct by focusing on "agreements between employers that restrict competition in labor markets").

24 *See, e.g.*, Carl Shapiro, *Antitrust in a Time of Populism*, 61 INT'L J. INDUS. ORG. 714, 716 (2018) (arguing that all three branches of government can improve and strengthen their application of antitrust law). For a symposium devoted to this topic, see Jonathan B. Baker et al., *Unlocking Antitrust Enforcement*, 127 YALE L.J. 1916, 1916–20 (2018), especially the introduction. For other writings in this vein, see TIM WU, THE CURSE OF BIGNESS: ANTITRUST IN THE NEW GILDED AGE 127–39 (2018); Lina M. Khan, *Amazon's Antitrust Paradox*, 126 YALE L.J. 710, 790–802 (2017).

25 *See, e.g.*, Gustavo Grullon, Yelena Larkin & Roni Michaely, *Are US Industries Becoming More Concentrated?*, 23 REV. FIN. 697, 700 (2019) (yes); Germán Gutiérrez & Thomas Philippon, *Declining Competition and Investment in the U.S.* 3–5 (Nat'l Bureau of Econ. Research, Working Paper No. 23583, 2017), https://www.nber.org/papers/w23583.pdf [https://perma.cc/39PG-RG3D] (documenting decline of competition).

its vast influence on labor conditions. In Part II, we discuss the law, specifically sections 1 and 2 of the Sherman Act and section 7 of the Clayton Act. We show how the law can be used against labor monopsony and discuss reasons why it has fallen short. In Part III, we propose four reforms to cure these failures.

I
ECONOMIC BACKGROUND

A. Theory

When employers establish wages and working conditions, they seek to minimize their labor costs while attracting the workers they need in the production process. In a perfectly competitive labor market, where workers can at no cost quit and obtain comparable work at alternative employers, the employer pays a wage equal to the worker's marginal revenue product—the amount of value that the worker adds to the employer's bottom line. Such a wage "clears" the market, attracting all workers willing to work in return for it and thus can be taken as a baseline for evaluating actual labor market conditions.[26]

Real-world wages deviate from the competitive ideal for many reasons, but our focus is the problem of employer monopsony—the ability to set wages below the marginal revenue product. There are three major sources of monopsony: concentration, search frictions, and job differentiation.

Concentration means that only one or a few employers hire a particular kind of worker in an area where workers reside and commute.[27] When few employers exist, workers who are underpaid by their existing employer are limited in their ability to quit and work for an alternative employer for a higher wage. This allows the incumbent employer to suppress the wage. Employer concentration also facilitates overt or tacit collusion, for example, where one firm acts as a "wage leader" by periodically announcing wage increases that other firms match.[28]

Search frictions refer to the difficulty faced by workers of finding new jobs if they are unsatisfied with their existing em-

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26 *See, e.g.*, RONALD G. EHRENBERG & ROBERT S. SMITH, MODERN LABOR ECONOMICS: THEORY AND PUBLIC POLICY 130–45 (12th ed. 2015) (overviewing the basic economics of labor markets and monopsony).

27 *See* Azar, Marinescu, Steinbaum & Taska, *supra* note 10, at 3–4.

28 *Cf.* Kleen Prods. LLC v. Int'l Paper, 276 F. Supp. 3d 811, 824–25 (N.D. Ill. 2017) (explaining a similar phenomenon in price setting), *aff'd sub nom.* Kleen Prods. LLC v. Ga.-Pac. LLC, 910 F.3d 927 (7th Cir. 2018).

ployer or are fired or laid off.[29] Search frictions exist because workers may be unaware of alternative employment opportunities in the area or elsewhere; or, while they may know that other employers are hiring, they have trouble comparing jobs because of various intangibles like the work environment. Even in the presence of good information and comparable jobs, a coordination problem leads to search frictions: workers do not know which firms other workers are applying to, so workers will end up overapplying to some jobs and underapplying to others. Workers who happen by chance to have applied to jobs that many other workers have also applied to have a low probability of getting hired, which increases the time it takes to find a job. If finding a job is hard and risky, then workers will settle for a low wage offer rather than keep searching.[30]

Job differentiation refers to the way that different employers offer workers different packages of amenities—including, for example, shift flexibility, childcare, vacation and sick time, and the overall atmosphere at work, such as whether it is intense, relaxed, noisy, collegial, or competitive. Workers sort themselves across employers according to the amenities that are offered, but as a result they may become vulnerable to wage suppression because they cannot credibly threaten to leave one job for another where the amenities are quite different.[31]

Antitrust law has traditionally been concerned with the problem of concentration. In most antitrust cases, the plaintiff must start by proving that the defendant possesses market power—meaning that the defendant controls a large share of a market and that only a few other firms control large shares as well.[32] For product markets, an example would be Coca-Cola, which controls about 43% of the nationwide nonalcoholic beverages market.[33] For labor markets, an example would be Home Depot, which controlled 100% of the market for cargo and freight agents in 142 commuting zones (out of the 709

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29 Alan Manning, *Imperfect Competition in the Labor Market*, *in* 4B HANDBOOK OF LABOR ECONOMICS 973, 976–78 (Orley Ashenfelter & David Card, eds., 2011) [hereinafter Manning, *Imperfect Competition*]; *see also* ALAN MANNING, MONOPSONY IN MOTION: IMPERFECT COMPETITION IN LABOR MARKETS 360–61 (2003) (providing an important stimulus for the modern literature).

30 Manning, *Imperfect Competition*, *supra* note 29, at 976–78.

31 *Id.*

32 *See* Roy B. Taylor Sales, Inc. v. Hollymatic Corp., 28 F.3d 1379, 1386 (5th Cir. 1994); Spectrofuge Corp. v. Beckman Instruments, Inc., 575 F.2d 256, 275–76 (5th Cir. 1978), *cert. denied*, 440 U.S. 939 (1979).

33 *Coca-Cola Company's Market Share in the United States from 2004 to 2018*, STATISTA (2019), https://www.statista.com/statistics/225388/us-market-share-of-the-coca-cola-company-since-2004/ [https://perma.cc/2AJY-DLCU].

commuting zones throughout the United States) in 2016.[34] However, antitrust law is more broadly concerned with any friction that could allow a firm to charge prices above the competitive level for goods and services and to pay prices below the competitive level when it buys goods, services, or labor.

Employers with monopsony power, whatever its source, can suppress wages (and degrade working conditions) in order to save labor costs. While some workers will quit as a result, an employer with monopsony power gains more in reduced labor costs than it loses from lower production. Both types of workers—those who continue working and those who quit—suffer from this state of affairs, and there is also harm to the economy as a result of the lower level of production.

Still, the distinction between concentration and the other sources of labor monopsony—search frictions and job differentiation—is important. Some antitrust doctrines are directed only to the problem of concentration. Blocking a merger, for example, can prevent concentration, but it cannot lower search costs or counter job differentiation. But the other sources of labor monopsony can also play a role in antitrust analysis. Search frictions and job differentiation can be the source of entry barriers that preserve a firm's monopsony, and under antitrust law the actions of a monopsonist—for example, its efforts to extend the monopsony into other markets—are subject to special scrutiny.[35] We will abstract from these distinctions henceforth, but they should be kept in mind.[36]

B. The Monopsony Landscape

Monopsony prevails in a large number of U.S. labor markets. Recent empirical work has documented this phenomenon by using the Herfindhal-Hirschman Index (HHI), which is widely used to assess monopoly power in the product market.[37] The HHI for a product market equals the sum of the squares of

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34 Based on the Burning Glass Technologies data and market definition used in Azar, Marinescu, Steinbaum & Taska, *supra* note 10, at 4–6.

35 *See* U.S. DEP'T OF JUSTICE & FED. TRADE COMM'N, HORIZONTAL MERGER GUIDELINES § 12 (2010), https://www.justice.gov/sites/default/files/atr/legacy/2010/08/19/hmg-2010.pdf [https://perma.cc/7ZNB-54B8] [hereinafter HORIZONTAL MERGER GUIDELINES] (discussing the scrutiny used when evaluating mergers of competing buyers).

36 Because antitrust law focuses mainly on concentration and can have only a limited impact on the other two sources of labor monopsony, even hypothetically perfect enforcement of antitrust law would leave a significant amount of labor monopsony intact. For a discussion, see Naidu & Posner, *supra* note 23, at 13–16.

37 *See* Azar, Marinescu, Steinbaum & Taska, *supra* note 10, at 6–7.

the market share of the firms that compete within that product market, multiplied by 10,000.[38] For example, if two firms divide the market equally, the HHI equals 5,000 $(0.5^2 + 0.5^2 * 10{,}000)$. An HHI of zero represents the theoretical ideal of perfect competition, while an HHI of 10,000 represents a product market dominated by a single monopolist. The value of the index is higher when there are fewer firms selling a product or when one firm dominates the market (for example, for two firms the HHI is higher when one firm sells 90% of products and the other 10% than when each of the two firms sells 50% of products)—as these are the conditions in which the competitive harm caused by market concentration is greatest.[39]

The Department of Justice and the Federal Trade Commission's *Horizontal Merger Guidelines* use the HHI to establish the conditions under which mergers and acquisitions among competitors are lawful.[40] An HHI above 1,500 means that a market is "moderately concentrated," and an HHI above 2,500 means that a market is "highly concentrated." When firms seek to merge in a market with a high HHI and when the merger would significantly increase the HHI, the government presumes that the merger is anticompetitive and may block it.

The HHI for a labor market is calculated in the same way as the HHI for a product market, except that the market share is the firm's share of a labor market, rather than its share of a product market.[41] To measure labor market concentration, we look at the number of vacancies in a particular labor market, and calculate the HHI based on each firm's share of those vacancies. A market where four firms post 25% of jobs each is highly concentrated with an HHI of 2,500. But before we go further, we should explain how labor markets are defined.

1. *Labor Markets*

The labor market definition has three elements: type of job (or skills); geographic scope; and time. First, we define a labor market by the type of job. The empirical literature relies on a list of "Standard Occupational Classifications" (SOC) main-

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38 *See* Marinescu & Hovenkamp, *supra* note 21, at 1039.

39 *See id.* (noting that mergers in markets with high HHI indices warrant concerns regarding their impact on competitiveness).

40 HORIZONTAL MERGER GUIDELINES, *supra* note 35, § 5.3.

41 Marinescu & Hovenkamp, *supra* note 21, at 1037, 1039.

tained by the Bureau of Labor Statistics,[42] and more specifically, an occupation at the six-digit SOC level, which represents a fairly specific definition of a job or occupation. Unfortunately, even the detailed six-digit SOC level is probably too broad for labor market definition. For example, "accountants and auditors" (13-2011) may be excessively broad because an experienced accountant may consider only a "senior accountant" job title position rather than the position of a junior or entry-level accountant.[43] Still, the SOC level is convenient for empirical work; because the SOC level is probably too broad, it also serves as a conservative assumption, with the result that the literature likely understates the degree of labor market concentration.

One may object that the SOC level is in fact also too narrow, at least for some workers. An accountant may tire of accounting and apply for a job as a manager of a business or go to medical school and start over as a doctor. However, the key question is: when faced with lower wages, how likely is a worker to apply to a different job or to quit a current job? The evidence shows that workers are not very sensitive to wages when choosing where to apply[44] or whether to quit a current job.[45] This limited sensitivity of workers to wages implies that employers have the latitude to lower wages below workers' marginal productivity without causing a large number of workers to quit.

Even though many occupations seem quite similar, the costs of switching occupations is high. Workers are more likely to switch between occupations that are similar in the kinds of tasks that are performed. However, the dissimilarity between tasks performed in different jobs is not the main barrier to transition across occupations;[46] this task dissimilarity ac-

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42 *See Occupational Employment Statistics*, U.S. DEP'T LAB., https://www.bls.gov/oes/current/oes_stru.htm [https://perma.cc/Z2W2-ELUS] (last updated Mar. 31, 2020).

43 *See* Ioana Marinescu & Ronald Wolthoff, *Opening the Black Box of the Matching Function: The Power of Words* 15 (Nat'l Bureau of Econ. Research, Working Paper No. 22508, 2016), http://www.nber.org/papers/w22508 [https://perma.cc/WQZ9-ASBK].

44 José Azar, Ioana Marinescu & Marshall Steinbaum, *Measuring Labor Market Power Two Ways*, 109 AEA PAPERS & PROC. 317–18 (2019); Marinescu & Wolthoff, *supra* note 43, at 11, 22 (finding that job titles act as a sufficient proxy for wages in most cases, and that a positive relationship between wages and number of applicants exists only when job titles are controlled for).

45 Manning, *Imperfect Competition*, *supra* note 29, at 1012.

46 Guido Matias Cortes & Giovanni Gallipoli, *The Costs of Occupational Mobility: An Aggregate Analysis*, 16 J. EUR. ECON. ASS'N 275, 312–13 (2018).

counts for only 14% of the cost of switching occupations.[47] Even between two very similar occupations, moves are hampered by other types of entry costs, including retraining and occupational licensing. Removing all barriers to mobility would increase occupational switches by about ten times.[48] The upshot is that, just because two occupations seem very similar, it does not mean that the cost of switching from one to the other is low.

Because of high occupational switching costs, workers do not react strongly to changes in wages across occupations. The costs of switching across occupations can be estimated by comparing actual occupational switches with the occupational switches that would happen if workers simply went to the highest paying occupation. Using this reasoning, studies estimate that switching occupations can entail a loss between half a year and three years of earnings.[49] These losses are significant, and therefore it is plausible that an employer that monopsonizes an occupation can impose a substantial wage cut without driving away many workers.

Second, we define the geographic scope of the market as the area where most workers work and live, and more specifically a commuting zone (CZ). Commuting zones are geographic area definitions comprising clusters of counties that were developed by the United States Department of Agriculture (USDA),[50] based on patterns of commuting. As we will discuss below, CZs are only approximations because some workers may commute across CZs, while others may refuse to take a job at the far end of the CZ in which she currently works. A very few labor markets—like the market for CEOs—may be national or international in scope. But again the results of the studies analyzing the impact of labor market concentration on wages are robust to different definitions of the geographic scope of the labor market, which suggests that the precise definition does not matter.[51]

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47 *Id.* at 278.

48 *Id.* at 302 tbl. 7.

49 Erhan Artuç & John McLaren, *Trade Policy and Wage Inequality: A Structural Analysis with Occupational and Sectoral Mobility*, 97 J. INT'L ECON. 278, 284 (2015); Etienne Lalé, *Worker Reallocation Across Occupations: Confronting Data with Theory*, 44 LABOUR ECON. 51, 59 (2017) ("We find that [mobility] costs fluctuate between 54 and 67% of annual earnings . . . .").

50 *See Commuting Zones and Labor Market Areas*, U.S. DEP'T AGRIC., https://www.ers.usda.gov/data-products/commuting-zones-and-labor-market-areas/ [https://perma.cc/E2KR-2EZ2] (last updated Mar. 26, 2019).

51 Benmelech et al., *supra* note 10, at 13–14; Hershbein et al., *supra* note 10, at 12–13; Kevin Rinz, *Labor Market Concentration, Earnings Inequality, and Earn-*

Third, the labor market must be limited in time because job seekers can afford to be unemployed only for a limited period of time. The median duration of unemployment was about a quarter of a year in 2016.[52] In sum, we define a labor market as the combination of a six-digit SOC occupation, a commuting zone, and a quarter, for example, accountants and auditors in Philadelphia in the first quarter of 2016.

2. *Labor Market Monopsony*

Labor market monopsony prevails when employers can pay workers wages below the competitive rate because of their high switch costs. As we noted above, monopsony has three sources: concentration, search frictions, and job differentiation. It is convenient to distinguish concentration because of the central role that it plays in antitrust, so henceforth we will refer to concentration and non-concentration (that is, search frictions or job differentiation) sources of monopsony.

Elasticity. The most direct measure of labor market monopsony is labor supply elasticity, which refers to workers' sensitivity to wages. Elasticity of infinity means that a worker will quit (or not take a job) if the wage is reduced even a tiny amount below the competitive wage, while elasticity of zero means that a worker will stay put (or still take a job) even if the wage is reduced significantly. As a rough rule of thumb, and drawing on the product-market literature, we say that a monopsony exists—that is, a problem that deserves legal attention of some sort—if a small but significant nontransitory reduction in wages (5% is a rule of thumb) will not result in a substantial reduction in employment, given quitting and hiring rates.[53] As a rough point of reference, consider an elasticity of two, which is common across labor markets.[54] An elasticity of two means that a 10% increase in wages entails a 20% increase in a firm's employment. If the elasticity is below two, then an employer that monopsonizes a labor market can profitably reduce wages by 5%.

HHI. The HHI for a labor market is calculated in the same way as the HHI for a product market, except that the market share is the firm's share of a labor market, rather than its share

ings Mobility 30 (Ctr. for Admin. Records Research & Applications, Working Paper 2018-10, 2018); Qiu & Sojourner, *supra* note 10, at 21–22.

52 Azar, Marinescu, Steinbaum & Taska, *supra* note 10, at 9.

53 *Cf.* HORIZONTAL MERGER GUIDELINES, *supra* note 35, § 4.1 (describing the rule for product markets); Naidu, Posner & Weyl, *supra* note 11, at 574–75.

54 Azar, Marinescu, Steinbaum & Taska, *supra* note 10, at 12.

of a product market. To measure labor market concentration, we look at the number of vacancies in a particular labor market and calculate the HHI based on each firm's share of those vacancies. A market where four firms post 25% of jobs each is highly concentrated with an HHI of 2,500.

Relationship between Elasticity and HHI. The elasticity measure reflects all three sources of monopsony power, while the HHI measures only concentration. Thus, for any market, the HHI necessarily understates employer power. Nonetheless, HHI and elasticity are correlated. Across all labor markets, a 10% increase in HHI is associated with a 2.2% decrease in a measure of the labor supply elasticity.[55] Across markets, wages decline with HHI, even after we control for the labor supply elasticity: this shows that concentration is an important determinant of wages, even after we account for labor market frictions captured by the labor supply elasticity.[56] Because of the traditional role of HHI in antitrust enforcement, we will focus on HHI in this Article.

Market power. Any labor market can be more or less monopsonistic, but there is another variable of interest: the power of any particular employer, which is usually measured in terms of market share. If a market is highly concentrated, there will typically be one, two, or three very large employers, and these employers will usually be the focus of antitrust law. It is also possible for a market to be less highly concentrated but still inelastic—for example, if there are high job search costs. These markets pose a challenge to antitrust enforcement because the various small employers probably do not take any actions that could be penalized, and hence deterred, in a practical way.

C. Empirical Findings

We can now turn to the results of the empirical literature. According to a leading study, in 2016, labor market concentration exceeded the high concentration threshold of 2,500 HHI in 60% of U.S. labor markets.[57] These highly concentrated markets account for 20% of U.S. employment. Larger cities generally have lower labor market concentration while labor markets

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55 Azar, Marinescu & Steinbaum, *supra* note 44, at 320. In this paper, the labor supply elasticity is approximated by the application elasticity, i.e., the percent increase in applications that results from a percent increase in the advertised wage.

56 *Id.*

57 Azar, Marinescu, Steinbaum & Taska, *supra* note 10, at 2.

are more concentrated in rural areas: for example, the labor markets in the Chicago commuting zone have a low average concentration (HHI of 301), while the labor markets in Kankakee and Iroquois counties (which form a commuting zone immediately south of the Chicago commuting zone) have a very high average concentration (HHI of 5,184, see red area in the Figure 1 below[58]). More broadly, the five least concentrated commuting zones have an average HHI below 400 and are: Los Angeles, New York, San Francisco, Philadelphia, and Chicago. The five most concentrated commuting zones are all in rural areas and have an average HHI above 8,800. This geographical variation reflects a well-understood fact about commuting: there is only so far that people are willing to commute. So in a densely populated area, there will be more employers, and hence more competition among employers for workers. Labor market concentration also varies across regions of the country, with higher concentration across a broad swath of the middle of the country.

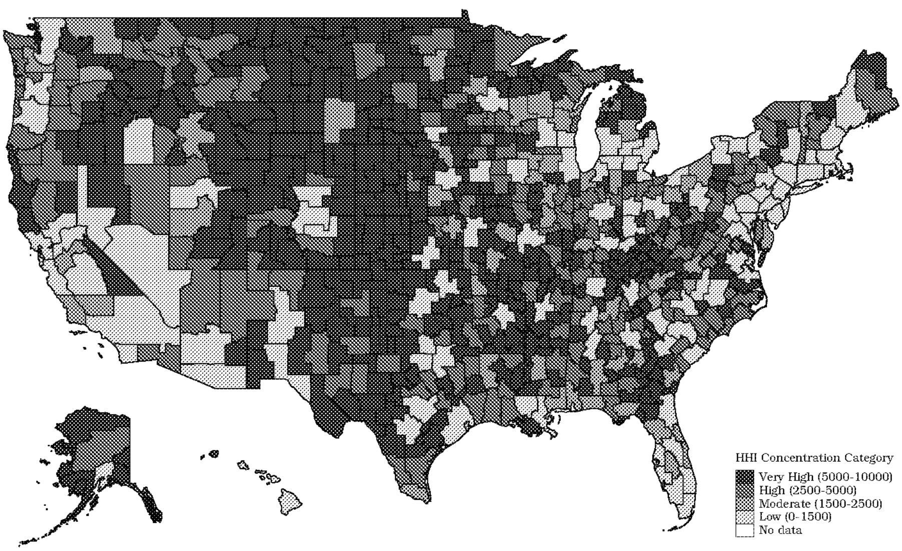

Figure 1. Average HHI by commuting zone, based on vacancy shares. This figure shows the average of the Herfindahl-Hirschman Index by commuting zone code for the top 200 SOC-6 occupations (ranked based on the number of vacancies) over the period 2016Q1-2016Q4 in the Burning Glass Technologies dataset. The categories we use for HHI concentration levels are: "Low": HHI between 0 and 1500; "Moderate": HHI between 1500 and 2500; "High": HHI between 2500 and 5000; "Very High": HHI between 5000 and 10000. These categories correspond to the DOJ/FTC guidelines, except that we add the additional distinction between high and very high concentration levels around the 5,000 HHI threshold. Market shares are defined as the sum of vacancies by a given firm in a given market (6-

58 *See id.* at fig. 1.

digit SOC by commuting zone) and year-quarter divided by total vacancies posted in that market and year-quarter.

Among the thirty largest occupations, the least concentrated occupation is "registered nurses" while the most concentrated is "marketing managers."[59] Among these common occupations, the top seven most concentrated occupations—marketing managers, management analysts, computer systems analysts, financial analysts, information security analysts, web developers, software developers who specialize in applications—are all highly skilled, but below there are a variety of high- and low-skilled occupations, including medical and health service managers, and customer service representatives. These findings accord with economic theory. Many different employers hire low-skill workers such as customer service representatives or secretaries and administrative assistants, while a high-skill worker invests in skills that may be suitable for only a small number of employers. But labor monopsony harms low-skill workers as well, especially in rural areas where few employers of any kind exist in any given commuting zone.

Higher concentration is associated with lower wages for workers. An increase in HHI by 10% in a given labor market is associated with a decrease in posted wages for job vacancies by 0.4% to 1.5%.[60] To illustrate, a legal secretary is looking for a job in Columbus, Ohio. The average pay there is about $33,000 a year, and the HHI is 2,969, already above the high concentration threshold. Suppose that, following a merger of law firms, the HHI increases by 27% to 3,762. This means that the wage for a legal secretary would decrease by up to 1.5% * 2.7 * 33,000 = $1,337. Thus, as a result of the merger, new legal secretary jobs in Columbus, Ohio would pay $31,663 per year instead of $33,000, all else equal.

To understand the effect of concentration on a worker's life, we can look to a farm equipment mechanic named Matt Gies, whose woes were chronicled in a New York Times article.[61] Mr. Gies was raised on a farm and always wanted to repair farm equipment. As a young man, he was hired by a local farm equipment distributor. Later, Mr. Gies's employer was pur-

59 *Id.* at fig. 4.

60 José Azar, Ioana Marinescu & Marshall Steinbaum, *Labor Market Concentration* (Nat'l Bureau of Econ. Research, Working Paper No. 24147, 2017), http://www.marinescu.eu/AzarMarinescuSteinbaum.pdf [https://perma.cc/VBZ6-B84Y].

61 Scheiber & Casselman, *supra* note 17.

chased by a bigger corporation, Riesterer & Schnell. His hours increased and his pay stayed almost flat, so he quit. However, he could not find another job as a farm equipment mechanic because most of these jobs were offered by Riesterer & Schnell, which owned several local distributors. This pattern is consistent with the very high level of labor market concentration for farm equipment mechanics in the whole U.S.[62] While Mr. Gies was able to find other jobs, these jobs did not bring him the same satisfaction, and at the time that the New York Times published its article about him, he was still looking for a job as a farm equipment mechanic, while doing occasional freelance repair work for acquaintances.

It is sometimes assumed that labor market and product market concentration coincide, as a result of which antitrust enforcement aimed at product market concentration would take care of labor market concentration as well. However, the data shows that labor market concentration is distinct from product market concentration and that it is labor market concentration rather than product market concentration that tends to depress wages.[63] While labor market concentration is higher for more product-concentrated industries than for less product-concentrated industries, this pattern is not very strong.[64] For example, plastic product manufacturing and cement and concrete product manufacturing both have a product market HHI below the low concentration threshold. However, the top occupation in plastics, "Molding, Coremaking, and Casting Machine Setters, Operators, and Tenders, Metal and Plastic," has an HHI above 5,000.[65] By contrast, the top occupation in cement and concrete is "Heavy and Tractor-Trailer Truck Drivers," which has a very low labor market HHI below 500.[66] A more familiar example is mining. Mines are often the only significant employers in a commuting zone, and hence the labor market for skilled miners is typically concentrated; but mines sell their products into national or global markets that are usually competitive. This shows that antitrust enforcement cannot rely on product market concentration to capture the degree of competition in the labor market.

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62 Azar, Marinescu & Steinbaum, *supra* note 60, at app. fig. A.3.

63 *See* Azar, Marinescu, Steinbaum & Taska, *supra* note 10, at 19 ("Labor market concentration is different from product market concentration, and occupational wages are lower when labor market concentration is higher, not when product market concentration is higher.").

64 *Id.* at 18.

65 *Id.*

66 *Id.* at 19.

The recent discovery that most labor markets are highly concentrated led some commentators to speculate that rising labor market concentration explains the stagnation of wages since the 1990s.[67] But the story is more complex. Labor market concentration decreased between 2000 and 2010 and has increased after 2010.[68] If we define a labor market by an industry (and commuting zone) rather than an occupation (and commuting zone), the data allow us to go back further in time to 1970 and indicates that industry-based labor market concentration decreased between 1970 and 2010 before shifting direction in 2010.[69] The decline in industry-based labor market concentration is partly driven by the increasing entry of large firms in commuting zones, for example, Walmart. Because concentration has decreased since 2000, rising concentration alone cannot explain wage stagnation. However, this is no reason for lax antitrust enforcement since labor market concentration has suppressed wages even in the recent period during which concentration has been lower than in the early 2000s.[70]

For another angle on the problem of monopsony, we can look at elasticity numbers rather than HHI. One way of measuring the labor supply elasticity is to estimate how the number of applications changes when posted wages increases. The average elasticity across markets is about 0.42, implying that a 10% increase in posted wages increases the number of applicants to a vacancy by 4.2%.[71] For 80% of workers living in the less densely populated commuting zones, the elasticity is very small and close to zero. Even in the 1% most densely populated areas, the elasticity is no greater than five, a level well below ten, a figure that roughly approximates perfect competition.[72] Thus, the common intuition that cities have perfectly competitive markets turns out to be false.

The negative relationship between labor market concentration and wages in the United States has been confirmed using different data sources, time periods, and definitions of the la-

67 *See* Scheiber & Casselman, *supra* note 17 ("In the past few years, a growing chorus of economists has expressed concern that consolidation among companies . . . could help explain the wage stagnation that has become a vexing feature of the labor market since the late 1990s.").

68 Qiu & Sojourner, *supra* note 10, at 40.

69 Hershbein et al., *supra* note 10, at 16; Rinz, *supra* note 51, at 13.

70 Rinz, *supra* note 51, at 26.

71 Azar, Marinescu & Steinbaum, *supra* note 44, at 317.

72 *Id.* at 320–21; Naidu, Posner & Weyl, *supra* note 11, at 565.

bor market.[73] Importantly, some of these studies used administrative data on employment, which shows that potential issues with job vacancies data are not driving the results. Studies have also specifically investigated the impact of mergers. One recent study looks at mergers from 1978 to 2016 between competing manufacturing firms that each owned at least one plant in a local labor market.[74] The study measured how the mergers increased HHI and then measured the wage impact of the HHI increase induced by mergers.[75] The study found that the mergers, through their effect on HHI, suppressed wages at an economically substantive and statistically significant level.[76] Another study focuses on hospital mergers and shows that when the merger significantly increases the labor market HHI, the wages of specialized personnel decrease.[77] That study also found that the wages of skilled hospital personnel are about 5% lower in markets above 2,500 HHI compared to perfectly competitive markets, and these same wages are about 18% lower in monopsony labor markets with 10,000 HHI. These additional studies of monopsony also show that when unionization is higher, the negative wage impact of HHI[78] and HHI-increasing mergers[79] is lessened. While concentration could be associated with uncontrolled-for variables that reduce wages, the negative impact of mergers on wages confirm that market power is one of the reasons why we observe a negative association between wages and concentration.

Theory predicts that labor market concentration should decrease employment as well as wages. However, determining whether concentration reduces employment because of monopsony is tricky because concentration could also lower employment as a result of efficiencies: for example, two hospitals that merge no longer need two accounting departments and thus may be able to fire accountants and support staff without losing productivity. The study of hospital mergers found negative wage effects but no output or employment effects.[80] This null effect on output and employment makes the anticompeti-

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73 See Benmelech et al., *supra* note 10, at 4; Hershbein et al., *supra* note 10, at 3; Rinz, *supra* note 51, at 19.

74 Benmelech et al., *supra* note 10, at 2.

75 *Id.* at 2–3.

76 *Id.* at 18.

77 Elena Prager & Matt Schmitt, Employer Consolidation and Wages: Evidence from Hospitals 14 (Feb. 16, 2019) (on file with the Washington Center for Equitable Growth, unpublished manuscript).

78 Benmelech et al., *supra* note 10, at 20.

79 Prager & Schmitt, *supra* note 77, at 25.

80 *Id.* at 43.

tive wage suppression effect more convincing since it is difficult to ascribe the wage reduction to a decline in labor demand for specialized hospital personnel. Wages plausibly decreased because workers' bargaining power declined in the face of higher labor market concentration. Even when employment does not decline as a result of an increase in concentration, there are other ways employers can use their better competitive position: for example, evidence from all U.S. labor markets shows that, when labor market concentration increases, employers require higher skill levels for the same type of job.[81] To the extent that employers can hire more skilled workers for the same or a lower wage level, labor market concentration depresses the rewards to productive work even more than is apparent by just looking at the average wage in an occupation.

While the unemployment rate in the U.S. economy in January 2019 is very low at 4%, the share of working age Americans who participate in the labor market is still below the level prior to the 2008 recession.[82] Low wages from the monopsony power exercised by employers may discourage workers from looking for jobs.

Overall, given the negative relationship between labor market concentration and wages, and the pervasiveness of labor market concentration in the United States, the time is ripe for labor-side antitrust litigation.

II
THE ANTITRUST LITIGATION GAP

Antitrust law is embodied in statutes that prohibit anticompetitive practices in any kind of market. The most important of these statutes are section 1 of the Sherman Act, which prohibits "restraint of trade;"[83] section 2 of the Sherman Act, which prohibits monopolization;[84] and section 7 of the Clayton Act, which prohibits mergers that substantially lessen competition.[85] The courts have acknowledged that the law applies to

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81 Hershbein et al., *supra* note 10, at 3.

82 *Compare* Press Release, Bureau of Labor Statistics, The Employment Situation—January 2019 (Feb. 1, 2019), https://www.bls.gov/news.release/archives/empsit_02012019.htm [https://perma.cc/8SQV-CW89] (marking the labor force participation rate at 63.2% and the unemployment rate at 4% in January 2019), *with* Press Release, Bureau of Labor Statistics, The Employment Situation—November 2007 (Dec. 7, 2007), https://www.bls.gov/news.release/archives/empsit_12072007.pdf [https://perma.cc/E29N-3LT3] (marking the labor force participation rate at 66.1% and the unemployment rate at 4.7%).

83 15 U.S.C. § 1 (2018).

84 *Id.* § 2.

85 *Id.* § 18.

labor markets as well as to product and other markets, and on a number of occasions employers have been held liable for anticompetitive labor market practices or settled lawsuits that challenged such practices.[86] But cases against labor monopsonists are extremely rare. In this Part, we provide the legal background and then turn to explanation.

A. The Law

The Sherman Act is a short, ambiguous statute that sought to tackle the problem of market concentration during the Gilded Age. Politicians and commentators at the time did not make a sharp distinction between product markets and labor markets. They worried that the immense trusts that monopolized sectors of the economy—oil, steel, sugar, railroads—posed a broad economic and political threat.[87] The word "monopsony" would not be coined until decades later, but everyone understood that the trusts could suppress the wages of workers as well as raise the prices of goods.[88] Thus, when section 1 declares in broad terms that "[e]very contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal,"[89] it refers to restraints of trade that suppress wages as well as restraints of trade that raise prices. Likewise, when section 2 imposes penalties on "[e]very person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons,

86 *See, e.g.*, Eastman Kodak Co. v. Image Tech. Servs., Inc., 504 U.S. 451, 481 (1992) (applying the Sherman Act to a product market); United Mine Workers of Am. v. Pennington, 381 U.S. 657, 665–66 (1965) ("One group of employers may not conspire to eliminate competitors from the industry and the union is liable with the employers if it becomes a party to the conspiracy."); Brown v. Pro Football, Inc., 50 F.3d 1041, 1054 (D.C. Cir. 1995) ("[A]s a general matter, the antitrust laws may apply to restraints on competition in non-unionized labor markets.").

87 *See* Robert H. Jerry, II & Donald E. Knebel, *Antitrust and Employer Restraints in Labor Markets*, 6 INDUS. REL. L.J. 173, 184–85 (arguing that Senator Sherman likely did not intend for the Sherman Act to apply to labor markets, highlighting the limited view of Commerce Clause power then prevalent).

88 WILLIAM LETWIN, LAW AND ECONOMIC POLICY IN AMERICA: THE EVOLUTION OF THE SHERMAN ANTITRUST ACT 58–59, 70 (1965). At the same time, organized labor did not lobby for the Sherman Act or demand antitrust investigations. Unions realized that an employer may refuse to raise wages because it feared that higher labor costs would force it to raise prices and lose market share, and that therefore combinations of employers may be more willing to raise wages than individual employers. For a contemporary account, see 1 ARTHUR J. EDDY, THE LAW OF COMBINATIONS 247–49 (1901); and for a more recent history, see DAVID BRODY, WORKERS IN INDUSTRIAL AMERICA: ESSAYS ON THE TWENTIETH CENTURY STRUGGLE 21-32 (2 ed. 1980).

89 15 U.S.C. § 1.

to monopolize any part of the trade or commerce,"[90] it encompasses monopsonization as well as monopolization. Similarly, the Clayton Act of 1914, which strengthened antitrust law, made no distinction between product and labor markets.[91] Section 7 prohibits stock acquisitions where "the effect of such acquisition . . . may be substantially to lessen competition, or to tend to create a monopoly."[92] The Supreme Court has confirmed that antitrust law applies to labor markets in the same way that it applies to product markets.[93] Thus, one would expect similar patterns of litigation with respect to both markets.

1. *Sherman Act, Section 1*

Product markets. Under section 1, firms are prohibited from entering agreements that have an anticompetitive effect. Some agreements are presumptively ("per se") illegal because they are very likely to stifle competition.[94] Most price-fixing agreements are per se illegal because they prevent price competition, though there are some unusual cases where price-fixing may be necessary for the goods to be produced.[95] Agreements to divide a market geographically or to limit competition over customers are also typically per se illegal.[96] However, most agreements are more complex and require a "rule of reason analysis," where the court must determine that the conspirators possess sufficient market power to be able to restrain competition, and that the agreement lacks a procompetitive justification.[97] Vertical restraints of trade—agreements between parties at different locations on the distribution chain—are subject to rule of reason analysis.[98] Because the parties to

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90 *Id.* § 2.

91 *See id.* § 18 (simply referring to markets and making no distinction between product and labor markets).

92 *Id.* § 18.

93 *See supra* note 18 and accompanying text.

94 *See* Nat'l. Soc'y of Prof'l Eng'rs v. United States, 435 U.S. 679, 692 (1978) ("[There are] agreements whose nature and necessary effect are so plainly anticompetitive that no elaborate study of the industry is needed to establish their illegality . . . they are 'illegal *per se*.'").

95 *See, e.g.*, Broad. Music, Inc. v. Columbia Broad. Sys., Inc. 441 U.S. 1, 23 (1979) (holding that "[j]oint ventures and other cooperative arrangements are . . . not usually unlawful, at least not as price-fixing schemes, where the agreement on price *is necessary to market the product at all*" (emphasis added)).

96 *See* Addyston Pipe & Steel Co. v. United States, 175 U.S. 211, 244–45 (1899).

97 Herbert Hovenkamp, *The Rule of Reason*, 70 FLA. L. REV. 81, 83 (2018).

98 Shubha Ghosh, *Vertical Restraints, Competition and the Rule of Reason*, *in* 4 ANTITRUST LAW AND ECONOMICS 213 (Keith Hylton ed., 2d ed. 2010).

the agreement do not compete, the agreement is not obviously anticompetitive, and so then the question becomes whether the agreement enables one party (or both parties) to block competition from its (or their) competitors.[99]

Courts routinely adjudicate section 1 product market cases. A Westlaw search suggests about fifty cases per year.[100] The cases are far too diverse to summarize, but a few general points can be made. Defendants include many of the largest and most important corporations in the United States. Many of the cases involve blatant antitrust violations (some of which resulted in criminal prosecution), where top executives met secretly to set prices or carve out product or geographic markets. A huge number of cases involve more subtle settings, where, for example, competitors exchange pricing information, conduct joint ventures, participate in trade associations, and agree with upstream suppliers or downstream buyers to limit resale, control quality, refuse to deal with competitors, and so on.

Labor markets. Section 1 applies to agreements to restrain competition in labor markets in the same way as it applies to product markets. Plaintiffs benefit from the per se rule when the agreement involves simple wage-fixing agreements.[101] Otherwise, with a few exceptions,[102] they have been forced to contend with the rule of reason. They must thus show that the defendants enjoy market power sufficient for them to restrain labor market competition, and that the agreement actually hinders rather than advances competition.

Courts rarely adjudicate section 1 labor market cases. A Westlaw search suggests about six cases per year, about a tenth of the results for product market cases.[103] And about half of these cases involve the special setting of sports leagues.[104] In the sports league cases, a league—the National Football League, the National Collegiate Athletic Association—

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99 *See* Hovenkamp, *supra* note 97, at 136.

100 Based on a Westlaw search for "section /3 1 /3 sherman +1 act & product +1 market" (January 18, 2019), which yielded 52 hits for the last year and 176 hits for the last three years.

101 *See* Fleischman v. Albany Med. Ctr., 728 F. Supp. 2d 130, 162 (N.D.N.Y. 2010) (denying motion to dismiss per se wage-fixing claim).

102 See *infra* section III.A.2, on franchise no-poaching cases.

103 Based on a Westlaw search for "section /3 1 /3 sherman +1 act & labor +1 market" (January 18, 2019), which yielded 6 hits for the last year and 17 hits for the last three years.

104 Based on a Westlaw search for "section /3 1 /3 sherman +1 act & labor +1 market & league" (January 18, 2019), which yielded 4 hits for the last year and 10 for the last three years.

coordinates various businesses that operate teams that compete against each other. The league agreement may restrict competition in multiple ways, for example, by regulating how much the teams pay players—in the NCAA case, the teams pay the players nothing.[105] Courts use rule of reason analysis to distinguish restrictions that are necessary to ensure that league play is possible and those that merely suppress compensation for athletes.

The remaining cases are more straightforward lawsuits against competitors in a particular industry who are accused of holding down wages. In *Fleischman v. Albany Medical Center*, for example, a class of registered nurses accused hospitals in the Albany area of agreeing to suppress wages for these employees.[106] There are a handful of other such cases, mainly in the hospital industry.[107]

An instructive case is *Todd v. Exxon Corp.*,[108] which shows the barriers facing plaintiffs who seek relief from monopsony. Employees of fourteen oil and petrochemical companies alleged that the companies exchanged salary information for nonunion managerial, professional, and technical (MPT) employees in the industry as a part of a conspiracy to suppress wages.[109] The plaintiffs argued that the companies, which jointly employed 80–90% of these employees, used the information to determine wages.[110] The plaintiff provided statistical evidence that one of the defendants, Exxon, reduced pay over the relevant time period while keeping it in line with its competitors.[111]

The district court dismissed the case for several reasons. First, it said that the plaintiff failed to plausibly define what it called the "product market"—it meant the labor market—because the employees are not "reasonably interchangeable."[112] Second, it believed that the relevant labor market must encompass every industry in which the MPT employees could obtain jobs—not just the oil industry—and thus the actual market share of the defendants was much less than 80–90%.[113] Third, the court held that the claim depended on the possibility of

105 *See* O'Bannon v. Nat'l Collegiate Athletic Ass'n, 802 F.3d 1049, 1079 (9th Cir. 2015) (vacating the district court's judgment that required the NCAA to allow its member schools to pay student athletes up to $5,000 per year).
106 728 F. Supp. 2d at 159.
107 For a discussion, see Miles, *supra* note 22.
108 126 F. Supp. 2d 321, 321 (S.D.N.Y. 2000).
109 *Id.* at 322–23.
110 *Id.* at 323.
111 *Id.* at 323–24.
112 *Id.* at 325.
113 *See id.* at 325–26.

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tacit coordination, but this was impossible because the market was not concentrated. It added that the plaintiffs had also failed to show that "demand for these 'products' is inelastic."[114] Fourth, it argued that Exxon's wage-setting behavior could have been unilateral rather than pursuant to agreement, and hence the plaintiff had failed to allege an agreement that could survive a motion to dismiss.[115]

The court (or possibly the lawyers who represented the plaintiff class, or everyone) was seriously confused. While it is true that the plaintiff lumped together different types of employees—lawyers and engineers, for example—each occupation could certainly be a labor market, and there is no requirement that employees within each market be identical or fungible, whatever that might mean. Moreover, an MPT labor market (or group of labor markets) limited to the oil industry could exist if, as the plaintiffs alleged, there were special characteristics of that industry that required experience and training to master, as is likely the case. The court's reference to demand inelasticity was also inapposite: the question was whether the supply of labor was inelastic in the sense that if wages were reduced in the claimed labor market(s), employees would have refrained from finding work elsewhere. Finally, the claim did not depend on agreement to suppress wages but agreement to share information, which was clearly alleged.[116] The question whether the agreement to share information affected wages was a matter for trial. The Court of Appeals, in an opinion by then-Judge Sonia Sotomayor, reversed on roughly these grounds, though it too incorrectly referred to the labor market as a product market (probably because the plaintiffs did as well).[117]

While the Court of Appeals rode to the rescue, the district court's opinion suggests some reasons why this type of case is so rare. The district judge clearly held a widespread—but incorrect—belief that labor markets are competitive, and that employees are not normally confined to a particular industry. Thus, he found reasonable allegations to be implausible. He also tripped over the product-side analogies and as a result made a hash of the economics of the plaintiff's claim.

Plaintiffs have enjoyed more success with lawsuits against employers who have entered no-poaching agreements—agreements not to try to hire away each other's employees. In 2010,

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114 *Id.* at 327.
115 *Id.*
116 *See id.* at 323.
117 *See* Todd v. Exxon Corp., 275 F.3d 191, 200–04, 214 (2d Cir. 2001).

the government sued various tech firms for entering no-poaching agreement, which the firms settled.[118] Piggyback litigation was also successful.[119] Plaintiffs were helped by the egregiousness of the firms' behavior—express promises by the tech companies' CEOs not to recruit each other's employees.[120]

Claims in more complex cases, in which agreements not to recruit are, for example, ancillary to settlements or other transactions, have been less successful.[121] In *Eichorn v. AT&T Corp.*, AT&T sold one of its subsidiaries to another company, and as part of the transaction agreed not to hire or solicit any of the more highly compensated employees of that subsidiary for eight months.[122] The employees sued, arguing that the no-poaching agreement violated section 1. The court evaluated the transaction under the rule of reason standard because the agreement was ancillary to the sale of the company and held in favor of the defendants.[123] A crucial part of its analysis was its rejection of the plaintiffs' market definition, which was "potential employers within a 35 mile radius of Holmdel/Middletown with the capacity and capability of employing or utilizing large numbers of persons with specialized experience in high speed data communications equipment of the sort Paradyne [the subsidiary] develops and makes."[124] The court said that the mar-

118 Press Release, U.S. Dep't of Justice, Justice Department Requires Six High Tech Companies to Stop Entering into Anticompetitive Employee Solicitation Agreements (Sept. 24, 2010), https://www.justice.gov/opa/pr/justice-department-requires-six-high-tech-companies-stop-entering-anticompetitive-employee [https://perma.cc/NU35-7N25].

119 *In re* Animation Workers Antitrust Litig., 123 F. Supp. 3d 1175, 1178 (N.D. Cal. 2015); United States v. eBay, Inc., 968 F. Supp. 2d 1030, 1032 (N.D. Cal. 2013); *In re* High-Tech Emp. Antitrust Litig., 856 F. Supp. 2d 1103, 1107–08 (N.D. Cal. 2012).

120 *See eBay, Inc.*, 968 F. Supp. 2d at 1035–36; *In re* High-Tech Emp. Antitrust Litig., 856 F. Supp. 2d at 1110.

121 *See, e.g.*, Hanger v. Berkley Grp., Inc., No. 5:13-cv-113, 2015 WL 3439255, at *12 (W.D. Va. May 28, 2015) (holding that in failing to define the proper labor market, plaintiffs failed to allege a plausible claim under section 1 of the Sherman Act); Cesnik v. Chrysler Corp., 490 F. Supp. 859, 868 (M.D. Tenn. 1980) (holding that an agreement by a corporation selling one of its divisions to not rehire any managerial employee who refused employment with the buying corporation was not a violation of the Sherman Act). *But see* Roman v. Cessna Aircraft Co., 55 F.3d 542, 543, 545 (10th Cir. 1995) (reversing district court's dismissal of antitrust complaint and holding that alleging (i) that illegal agreement was only reason the plaintiff was not hired by competitor, (ii) that market for the plaintiff's engineer services was impeded, and (iii) that illegal agreement prevented the plaintiff from selling services to highest bidder, was sufficient for antitrust standing).

122 248 F.3d 131, 136–37 (3d Cir. 2001).

123 *Id.* at 144, 150–51.

124 *Id.* at 147.

ket definition should "include[ ] all those technology companies and network services providers who actively compete for employees with the skills and training possessed by plaintiffs."[125] It added that "there are over twenty companies that compete for employees with plaintiffs' technical skills. Additionally[,] there are a 'vast number of jobs' nationwide for plaintiffs with more generalized work and educational experience."[126] With such a broad market definition, AT&T lacked market power. But this market definition is too broad. Most workers do not move far away to find new jobs,[127] and when specialized skills are not transferable, the employer exercises market power.

Courts have also stumbled in cases involving no-poaching agreements within franchises. Some old doctrine suggests that franchises should be treated as a "single entity"; no-poaching agreements imposed by the franchisor on franchisees cannot be a violation of section 1 as there cannot be a one-party "agreement."[128] More recently, the Supreme Court has recognized that the single entity doctrine honors a legal fiction,[129] one that allows firms to collude to suppress wages, and has been taken advantage of by many franchises.[130] In the wake of the state actions against franchise no-poaching agreements, lawyers have filed class actions against numerous franchises.[131] These cases are at a very early stage, but they do suggest that the barrier to section 1 litigation has begun to erode.[132]

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125 *Id.* at 147–48.

126 *Id.* at 148 n.5.

127 *See* Alan Manning and Barbara Petrongolo, *How Local Are Labor Markets? Evidence from a Spatial Job Search Model*, 107 AM. ECON. REV. 2877, 2905 (2017); Ioana Marinescu & Roland Rathelot, *Mismatch Unemployment and the Geography of Job Search*, 10 AM. ECON. J.: MACROECONOMICS 42, 46–51 (2018).

128 *See, e.g.*, Williams v. I.B. Fischer Nevada, 794 F. Supp. 1026, 1032–34 (D. Nev. 1992), 999 F.2d 445 (9th Cir. 1993) (granting motion to dismiss on section 2 claim where the plaintiff, who complained that he was terminated without good cause by an employer who allegedly had labor market power, failed to allege an anticompetitive act).

129 *See* Am. Needle, Inc. v. Nat'l Football League, 560 U.S. 183, 191 (2010).

130 Krueger & Ashenfelter, *supra* note 5, at 21–22.

131 *See* Erin Mulvaney, *Thinking About a 'No-Poach' Agreement? What Employers Should Know*, LAW.COM: NAT'L L.J. (Oct. 26, 2018, 1:13 PM), https://www.law.com/nationallawjournal/2018/10/26/thinking-about-a-no-poach-agreement-what-employers-should-know/ [https://perma.cc/3NFK-LFMA].

132 For further discussion of the franchise no-poach cases, see Eric A. Posner, The Antitrust Challenge to Covenants Not to Compete in Employment Contracts 26-27 (Sept. 13, 2019) (unpublished manuscript), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3453433 [https://perma.cc/VUT3-CFZS].

2. *Sherman Act, Section 2*

Product Markets. Section 2 prohibits firms from obtaining or maintaining monopolies through anticompetitive means—rather than "naturally" or in pro-competitive ways, for example, through innovation.[133] A typical section 2 case involves a defendant who already monopolizes a product market and is accused of using its monopoly power to block other firms from entering the market or to extend its monopoly power into new markets.[134] The plaintiff must normally define a product market, establish that the defendant controls a large share of that market, and prove that the defendant obtained or maintained that monopoly in an illegitimate way.[135]

Section 2 product-market cases are adjudicated almost as frequently as section 1 product-market cases—about forty to fifty per year.[136] But they can be hard to prove because allegedly anticompetitive behavior can frequently be given a business justification. For example, a monopolist that gives discounts to buyers who commit to a large volume of its products could be accused of trying to maintain its monopoly by depriving market entrants of demand. But it might also be cheaper to sell to large-volume buyers than to small-volume buyers. Monopolists who are accused of extending their monopolies to new markets can argue that they are simply offering buyers in one market the convenience of transacting with the same seller in another market. Still, there have been many notable section 2 cases—including the government's case against Microsoft, which monopolized the market for operating systems for IBM-clone personal computers.[137]

Labor Markets. Plaintiffs should similarly be able to bring section 2 cases against employers who monopsonize labor markets by defining a labor market, establishing that the employer controls a large share of the labor market, and proving that the

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133 *See* 15 U.S.C. § 2 (2018).

134 *See, e.g.*, United States v. Microsoft Corp., 253 F.3d 34, 45, 64 (D.C. Cir. 2001) (explaining that the section 2 claims made against Microsoft were on the basis that they had an existing monopoly in the area of PC operating systems and further used that monopoly to gain a new monopoly in the market for internet browsers).

135 *See, e.g.*, *id.* at 51–56, 58–59 (breaking down the court's legal analysis of whether Microsoft might have violated section 2 by first analyzing the "[m]arket definition," followed by an analysis of "[m]arket power," ended by an analysis of "[a]nticompetitive [c]onduct").

136 Based on a Westlaw search of "section /3 2 /3 sherman & product +1 market" (January 24, 2019), which yielded 50 hits for the last year and 174 hits for the last three years.

137 *Microsoft Corp.*, 253 F.3d at 46.

employer has obtained or maintained that monopsony by engaging in anticompetitive acts. However, section 2 labor monopsony cases are extremely rare. A Westlaw search yielded only two cases in the last year and five cases over the last three years.[138]

The results of the Westlaw search probably understate the problem. We have not found a single section 2 labor monopsony case, ever, in which the claim survived a summary judgment motion. And nearly all the cases we have found are ones in which the section 2 claim is tacked on to a more substantive claim, like a section 1 collusion claim or a nonantitrust claim relating to a garden-variety employment-law dispute. In most of these cases, the plaintiff failed to define a labor market or to defend his or her definition or failed to identify an anticompetitive act. In other cases, the plaintiff lacked standing.

A few examples illuminate the dismal landscape. In *Thomsen v. Western Electric Co.*, employees of Western Electric sued that company, its parent, AT&T, and another subsidiary, Pacific Telephone, for violating the antitrust laws by agreeing not to hire each other's employees.[139] The court rejected a section 1 claim because the three companies were a single entity, and a single entity cannot conspire with itself.[140] On the section 2 issue, the employees lacked antitrust injury because they accused the defendants of monopolizing the product market (telephone service) rather than the labor market, which they should have identified and defined as craft telephone workers in the relevant geographic market.[141] The court's view is reasonable: a firm that monopolizes the product market harms consumers but does not necessarily harm workers; indeed, the workers might benefit if managers decide to share the monopoly profits with them and, in any event, will not be harmed if the labor market is competitive. Thus, there is no antitrust injury.[142] The section 2 claim also failed because a company's internal policy not to allow employees to move among its divisions did not reduce competition as understood in antitrust policy, which encourages independent employers to compete with

138 Based on a Westlaw search of "section /3 2 /3 sherman & labor +1 market" (January 24, 2019). This search, like the earlier ones, should be taken with many grains of salt because of variations in how judges write opinions and the types of issues that arise in these cases, but they give one a rough sense of litigation patterns.

139 680 F.2d 1263,1265 (9th Cir. 1982).

140 *Id.* at 1266.

141 *Id.* at 1267.

142 Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc., 429 U.S. 477, 487–88 (1977).

each other for workers but does not require intrafirm competition.[143] Thus, even if the employees had properly defined a labor market, they might still have lost.

In *Minnesota Ass'n of Nurse Anesthetists v. Unity Hospital*, a group of anesthesia nurses sued hospitals that had "outsourced" them—fired them and then rehired them through various intermediaries that directly employed them.[144] The nurses alleged that their terminations were the result of a conspiracy between anesthesia doctors—who sought to eliminate competition from the lower-paid nurses—and the hospitals, who passed on the increased cost to Medicare. The court wrongly held that to show antitrust injury the nurses must show that anesthesia prices would increase, which they could not—but in any event, the nurses apparently did not try to show that their compensation declined.[145] Nor could they prove section 2 conspiracy because neither hospital controlled a substantial portion of the anesthesia market—though again the court should have looked at the market for anesthesia nurses, not the product market.[146]

In re NCAA I-A Walk-On Football Players Litigation involved a challenge to the NCAA's rules limiting the award of scholarships to players.[147] The court incorrectly referred to the labor market at issue as a "product market."[148] However, it recognized that a market for "skilled amateur football players" was properly alleged and thus denied the defendants' motion to dismiss.[149] However, the case later collapsed when the court denied a motion for class certification, as we will discuss below.[150]

3. *Clayton Act, Section 7*

Product markets. Section 7 of the Clayton Act prohibits stock and asset acquisitions where "the effect of such acquisition may be substantially to lessen competition, or to tend to create a monopoly."[151] While those injured by such mergers may sue for relief, private litigation has been crowded out by

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143 *See Thomsen*, 680 F.2d at 1267.
144 5 F. Supp. 2d 694, 698 (D. Minn. 1998), *aff'd*, 208 F.3d 655 (8th Cir. 2000).
145 *See id.* at 701–03.
146 *Id.* at 710–11.
147 398 F. Supp. 2d 1144, 1146–47 (W.D. Wash. 2005).
148 *Id.* at 1150.
149 *Id.*
150 *In re* NCAA I-A Walk-On Football Players Litig., No. C04-1254C, 2006 WL 1207915, at *15 (W.D. Wash. May 3, 2006).
151 15 U.S.C. § 18 (2018).

government involvement. Under the Hart-Scott-Rodino Act,[152] large firms that plan to merge must first give notification to the Justice Department and Federal Trade Commission. DOJ/FTC approval typically forecloses private litigation.

For horizontal mergers, the government asks whether the merger will take place in a concentrated product market and will significantly increase the concentration of that product market.[153] If so, the merger is illegal unless the merging companies can show that the merger will produce offsetting efficiencies that lower prices for consumers.[154] In 2017, a typical year, the FTC and DOJ investigated fifty-one mergers; the FTC challenged twenty-three of them and generated fifteen final orders, six of which resulted in the abandonment or restructuring of the merger, and two of which resulted in administrative or federal court litigation.[155] The DOJ challenged eighteen of the mergers, resulting in six abandonments and one restructuring.[156]

Labor markets. In stark contrast, the government has never—not in 2017, not ever—blocked a merger or even evaluated a merger based on its labor market effects.[157] The *Horizontal Merger Guidelines* do not explicitly contemplate evaluation of mergers based on labor market effects or even mention the problem of labor market monopsony.[158] (However, the *Guidelines* do apply to input markets and therefore in principle to labor markets.) The legal approach would mirror the product-market analysis that the *Guidelines* describe: ask first whether the firms operate in concentrated labor markets and, if so, whether their merger would significantly increase concentration in those labor markets. There is significant empirical evidence that mergers have done just that.[159]

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152 *Id.* § 18a.

153 HORIZONTAL MERGER GUIDELINES, *supra* note 35, § 7.1.

154 *See id.* § 10.

155 U.S. DEP'T OF JUSTICE & FED. TRADE COMM'N, HART-SCOTT-RODINO ANNUAL REPORT: FISCAL YEAR 2017 at 2, 5 (2017), https://www.ftc.gov/system/files/documents/reports/federal-trade-commission-bureau-competition-department-justice-antitrust-division-hart-scott-rodino/p110014_fy_2017_hsr_report_final_april_2018.pdf [https://perma.cc/76YV-TZ4V].

156 *Id.* at 2.

157 In *United States v. Anthem, Inc.*, 855 F.3d 345, 377 (D.C. Cir. 2017) (Kavanaugh, J. dissenting), the government did oppose a merger in part based on labor-market effects, but the government's argument focused on the product market, as did the court's decision.

158 HORIZONTAL MERGER GUIDELINES, *supra* note 35.

159 Benmelech et al., *supra* note 10, at 15–18; Prager & Schmitt, *supra* note 77, at 15–24.

Because of the government's failure to review mergers for their labor market effects and the high visibility of mergers, one might expect to see substantial private litigation brought by workers to challenge mergers that would cause layoffs and wage reductions. But the Supreme Court imposed a major barrier on such cases in 1975 when it held, in *United States v. American Building Maintenance Industries*, that the Clayton Act does not apply to mergers where one of the merging firms operates entirely within a state rather than across state lines.[160] The decision was based on language in the Clayton Act ("engaged in commerce") that does not exist in the Sherman Act.[161] Thus, only mergers between national firms can be challenged.

We have found a single section 7 case based on labor market monopsony. In *International Ass'n of Machinists and Aerospace Workers, AFL–CIO, Local Lodge No. 1821 v. Verso Paper Corp.*, a group of former employees who had been laid off from a paper mill in advance of its sale sued to enjoin the buyer from consummating the merger.[162] The court held that the employees lacked antitrust standing even though normally a merger that reduces labor costs by eliminating competition for workers would harm employees in just the way that antitrust laws are meant to prevent.[163] But the court's error was understandable. The plaintiffs had argued that the merger would simultaneously concentrate the product market (coated printing paper) and "the market for the specialized labor provided by plaintiffs that have been trained to work in paper production."[164] But, as far as the opinion suggests, the plaintiffs focused on the product market side and said little about the labor market. As a result, the court seemed to think the employees sought standing to challenge the product market harm.[165] But courts do not give employees standing to sue firms for wrongdoing that is directed at others, here, consumers. The court did give the employees standing in their capacity as purchasers of paper but never addressed the merits of the labor market argument.[166]

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160 United States v. Am. Bldg. Maint. Indus., 422 U.S. 271, 285–86 (1975).
161 *Id.* at 283.
162 80 F. Supp. 3d 247, 251 (D. Me. 2015).
163 *Id.* at 269, 276.
164 *Id.* at 259.
165 *Id.* at 275.
166 *Id.* at 277.

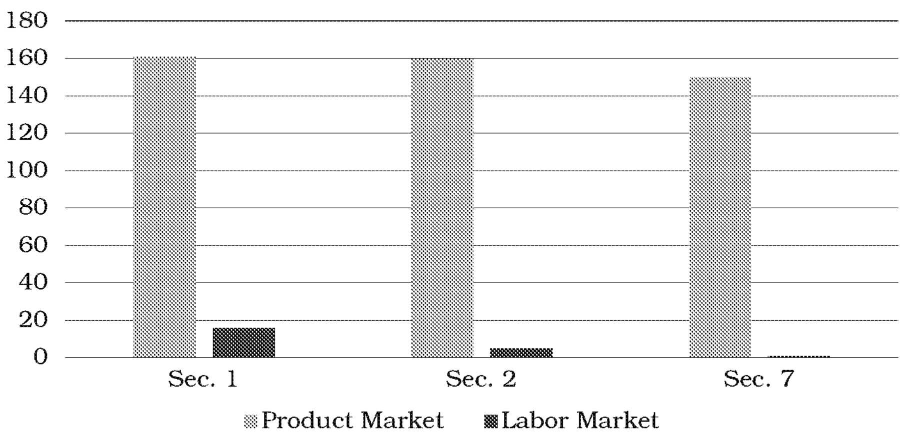
In 2018, the FTC's chairman announced that it would begin reviewing mergers for their effects on labor markets.[167] Thus, the long drought may come to an end.

B. What Accounts for the Scarcity of Labor Monopsony Cases?

1. *The Baseline*

We say that labor monopsony cases are rare, but a natural response is compared to what? If we had made this claim several years ago, the response would have been that labor monopsony cases are rare because labor markets are normally competitive. Such a response is no longer possible, but the question remains. A natural starting point for thinking about labor market litigation is product market litigation. Labor market litigation is certainly rare compared to product market litigation, as Figure 2 shows.

FIGURE 2
ANTITRUST CASES OVER LAST THREE YEARS



Note: Section 1 and 2 counts are based on searches of the Antitrust database in Westlaw. See supra notes ??? for search terms. Section 7 counts (for labor markets, the number is zero) are taken from the DOJ and FTC, see supra note ???.

Our question, then, is what accounts for this litigation gap? A number of possibilities suggest themselves.

Theory. One possible argument is that as a matter of economic theory, firms have a stronger incentive to seek control

167 *Oversight of the Enforcement of the Antitrust Laws: Hearing Before the Subcomm. on Antitrust, Competition Policy and Consumer Rights of the S. Comm. on the Judiciary*, 115th Cong. (2018) (statement of Joseph Simmons, Chairman, Federal Trade Commission).

over product markets, which allows them to raise prices, than labor markets. However, the two types of incentives are symmetrical. A firm that controls labor markets increases profits by reducing labor costs, while a firm that controls product markets increases profits by raising prices. The effect on the bottom line is the same.

The empirical prevalence of monopolized markets. Another theory is that product markets are more numerous than labor markets, or that product markets are more concentrated than labor markets are. However, there is no reason to think that product markets are more numerous than labor markets. There are many nationwide product markets, involving commodities like oil, goods like cars, and so on, and very few nationwide labor markets.[168] That said, there are also many local product markets, and we have not found anyone who has bothered to count them up. For labor markets, the CZ * SOC definition suggests as many as 267,546 labor markets; if we count only labor markets with at least 100 employed workers, then this number falls to a still-high 173,653. Sixty percent of the labor markets in the top 200 occupations (representing 90% of all vacancies)—more than 70,000—are highly concentrated and more than eight million people work in those markets.[169] Even if product markets outnumber labor markets, we would surely expect more than a handful of labor market cases.

With respect to comparative market concentration, labor markets are probably more concentrated than product markets are because they tend to be more local. As just noted, 60% of U.S. labor markets have an HHI above 2,500; 25% of labor markets have an HHI above 7,200.[170] We do not have comparable figures for all product markets, but if we focus on manufacturing in 2012, product market HHI is 411 on average, compared to 3,955 for the labor market HHI weighted by local employment.[171]

Conventional (but dated) wisdom in economics, and data limitations. A third theory is that lawyers have brought relatively few labor market cases because economists have told them that labor markets are usually competitive, and until recently, the statistical evidence of labor market monopsony has been limited. Indeed, much of the evidence has become available only in the last several years. In contrast, evidence of

168 *See* Manning & Petrongolo, *supra* note 127.
169 *See* Azar, Marinescu, Steinbaum & Taska, *supra* note 10, tbl. 1.
170 *Id.* at 13.
171 *See id.* at 3, 18.

concentration in product markets has been available for quite some time. We suspect, in addition, that the economic advances in understanding product markets have been driven forward by product market litigation, which has financed it, in a self-reinforcing cycle. Because so little labor side litigation has taken place, research on labor monopsony has lagged.

Legal hostility/uncertainty. The scarcity of labor monopsony litigation has left behind a thin trail of case law. Another self-reinforcing cycle may be at work. Because there is more product-side litigation than labor-side litigation, there is more product-side case law, and thus product-side outcomes are easier to predict. Because lawyers understand product-side law better than labor-side law, they are more likely to bring product-side cases, which further develops product-side law.

The evidence for this theory is strong. We have already seen the courts' struggles with labor monopsony cases. In some cases, they make basic errors, not even realizing that labor markets are different from product markets.[172] In others, misled by the mirror-image analogy of product-market analysis, they conduct the labor analysis backward.[173] In nearly all the cases we have found, the labor market definition is superficial, even when the courts accept it. Plaintiffs fail to describe the geographic limits of the labor market;[174] do not distinguish different labor markets within a class;[175] fail to defend their labor market definitions;[176] and so on. In other cases, the courts have rejected reasonable market definitions because they assume that labor markets are broader than they in fact

172 *E.g.*, *In re* NCAA I-A Walk-On Football Players Litig., 398 F. Supp. 2d 1144, 1150 (W.D. Wash. 2005) (referring incorrectly to the labor market as a product market).

173 Todd v. Exxon Corp., 126 F. Supp. 2d 321, 325 (S.D.N.Y. 2000).

174 *E.g.*, Helmerich & Payne Int'l Drilling Co. v. Schlumberger Tech. Corp., No. 17-CV-358-GKF-FHM, 2017 WL 6597512, at *5 (N.D. Okla. Dec. 26, 2017) ("Complaint is silent as to the geographic market, and includes no facts upon which an inference of the relevant geographic market may be based.").

175 Todd v. Exxon Corp., 275 F.3d 191, 199, 202 (2d Cir. 2001).

176 *See, e.g.*, *Helmerich & Payne Int'l Drilling Co.*, 2017 WL 6597512, at *5–7 (dismissing the claim because the plaintiff's labor market definition—"specialized engineers"—was insufficiently specific, failed to refer to the interchangeability of the engineers working for each firm, and lacked a geographic market); Hanger v. Berkley Grp., Inc., No. 5:13-cv-113, 2015 WL 3439255, at *10–(W.D. Va. May 28, 2015) (dismissing case because plaintiffs failed to defend geographic scope of market); Mooney v. AXA Advisors, LLC, 19 F. Supp. 3d 486, 499 (S.D.N.Y. 2014) (rejecting labor market definition because of lack of "discussion about the insurance agent labor supply, the existence of other insurance agents that are not affiliated with AXA, potential barriers to entry into the insurance agent market, or systemic barriers that might prevent an agent from changing insurance employers").

are.[177] Finally, a few of the cases are difficult to explain as anything other than judicial skepticism, or at least uncertainty about how to address arguments in the absence of well-developed case law.[178]

A striking example is *Llacua v. Western Range Ass'n*,[179] a case that was decided by the Tenth Circuit shortly before this Article went to press. The plaintiffs were foreigner workers who had entered the United States with agricultural work visas to work as sheepherders on ranches throughout the United States. The ranchers used two organizations that they controlled to recruit workers, which was permitted by U.S. law. However, according to the complaint, the ranchers also authorized the organizations to offer wages, which the organizations fixed at the minimum allowable by law. While this behavior would be a straightforward wage-fixing agreement in violation of section 1 of the Sherman Act, the Tenth Circuit panel affirmed the lower court's dismissal of the antitrust claims.[180]

The Court's main argument was that the complaint failed to allege facts "from which it can be inferred ranches needed to offer more [than the legal minimum wage] to attract a sufficient number of qualified workers."[181] Moreover, the conspiracy made no "economic sense" because the ranchers "had no ra-

177 Eichorn v. AT&T Corp., 248 F.3d 131, 147–48 (3d Cir. 2001). *But see* Rock v. Nat'l Collegiate Athletic Ass'n, No. 1:12–cv–1019–JMS–DKL, 2013 WL 4479815, at *14 (S.D. Ind. 2013) (accepting labor market definition despite problems); Cason-Merenda v. Detroit Med. Ctr., 862 F. Supp. 2d 603, 647 (E.D. Mich. 2012) (recognizing that a labor market could be composed of nurses who work for hospitals and not, as the defendant argued, nurses who work for non-hospitals as well).

178 An egregious example is Maderazo v. VHS San Antonio Partners, LP, where a court denied a motion for class certification because it believed that the experts failed to establish causation—that the alleged wage-fixing conspiracy caused harm to the class members. No. SA-06-CA-535-OG, 2019 WL 4254633, at *9 (W.D. Tex. Jan. 22, 2019). The real grounds for the court's decision was not class certification—obviously, causation is a common issue—but failure of proof of causation. The problem was that while the experts could show that the wages were lower than the competitive level, they could not tie the wage reduction to a specific act—since the allegation was that the defendants had held numerous meetings over a period of time during which they negotiated wage commitments. But it is hard to see how any wage-fixing case (or even price-fixing case) could survive this judge's skepticism. For a more mundane example of judicial caution in light of uncertainty, see Paul Gift, *UFC Hearing: Judge Calls for Expert Witness and Joe Silva Questioning*, FORBES (Dec. 20, 2018, 10:00 AM), https://www.forbes.com/sites/paulgift/2018/12/20/ufc-hearing-judge-calls-for-expert-witness-joe-silva-questioning-mma-news/#4dca24119024 [https://perma.cc/4MRJ-XYQE].

179 930 F.3d 1161, 1168 (10th Cir. 2019).

180 *Id.* at 1169.

181 *Id.* at 1181.

tional economic motive" to "depress wages paid by their competitors in other states."[182] But it is simply an economic error to claim that competitors are allowed to fix prices as long as those prices attract "sufficient" customers. Competitors are supposed to bid against each other, so that they end up charging customers less than those customers are willing to pay and workers more than they are willing to work for. The uniform wage—at the legal minimum, to boot—was overwhelming evidence of conspiracy. The conspiracy made economic sense because all competitors saved money on labor costs; this, again, is exactly what happens in any antitrust conspiracy.[183]

Government neglect. A large portion of private product-side litigation piggybacks on government investigations and litigation, which both uncover otherwise unknown antitrust violations and establish useful precedents.[184] The near absence of government enforcement of antitrust law in labor markets until very recently thus helps explain the scarcity of private litigation. Even today, the government's attitude toward labor monopsony claims reflects a degree of skepticism. Early in 2019, the Department of Justice filed notices in several class actions in which it argued that the franchise no-poaching agreements being challenged should be evaluated under the rule of reason rather than the per se rule.[185] While the Justice Department's argument is not absurd from a legal perspective, the application of the rule of reason makes private litigation harder in practice, thereby cementing monopsony power. The government's interventions in private litigation signal skepticism toward these claims.

Class actions: incentives and law. Private litigation against monopolists takes two forms: class actions and litigation brought by corporate rivals or victims. Class actions are financed by lawyers and so are risky and expensive. In the case

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182 *Id.*

183 The opinion can be contrasted to *Beltran v. InterExchange, Inc.*, where the court denied the motion to dismiss under a similar set of facts, except involving nannies rather than sheepherders. 176 F. Supp. 3d 1066, 1088 (D. Colo. 2016). But the case was distinguished by a rare "smoking gun"—the plaintiff's investigator was told by the director of one of the defendants that the defendants agreed to fix wages. *Id.* at 1074. Such "direct" evidence is extremely rare in antitrust cases.

184 One study found, based on a sample of forty large cases that led to a recovery, that twenty-six of those cases were initiated by the government. *See* Robert H. Lande & Joshua P. Davis, *Benefits from Private Antitrust Enforcement: An Analysis of Forty Cases*, 42 U.S.F. L. REV. 879, 897–98 (2008).

185 Bryan Koenig, *DOJ Gives Fast-Food Chains Ammo Against No-Poach Suits*, LAW360 (Jan. 29, 2019, 9:11 PM), https://www.law360.com/articles/1123203/doj-gives-fast-food-chains-ammo-against-no-poach-suits [https://perma.cc/3HPZ-MKVW].

of product markets, however, class actions are often nationwide—because product markets are often nationwide—and thus offer potentially enormous damages.[186] In contrast, the classes in labor market cases are usually small—involving a geographically limited group, often just a town or city, and hence a lower level of damages.[187] Thus, lawyers will naturally be oriented toward product-side class actions.

Moreover, employees may have more trouble with class certification than consumers and other product-side victims do. In a consumer-side class action, plaintiffs usually allege that the defendant has charged a supracompetitive price.[188] Class members are thus similarly situated—they bought the same goods, and all paid a price higher than they should have. Subtle variations—for example, volume discounts, or price changes—can be handled algorithmically. In contrast, employees who bring labor-side cases typically differ from each other along numerous dimensions. One court, in denying a motion for class certification, noted that:

> The types of injury Plaintiff alleges are (1) decreased salaries and (2) deprivation of new job opportunities. In order to prove these types of injury, a number of individual determinations would have to be made. Defendants point out that resolution of each claim would depend on the consideration of several factors; for example, whether the employee's contract was the result of arms length negotiation, whether a covenant not to compete was included in a particular employee's contract; the employee's salary history, educational and other qualifications; the employer's place of business; the employee's willingness to relocate to a distant competitor, and their ability to seek employment in other industries in which their skills could be utilized (e.g., pharmaceuticals, cosmetics).[189]

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186 *See* HORIZONTAL MERGER GUIDELINES, *supra* note 35, § 4.2.2.

187 *See* Minn. Ass'n of Nurse Anesthetists v. Unity Hosp., 208 F.3d 655, 658–59 (8th Cir. 2000) ("[P]laintiffs assert that the sole-source contracts were part of a 'grand conspiracy' by Minnesota anesthesiologists" to eliminate competition in the Twin Cities.).

188 *See e.g.*, White v. R.M. Packer Co., 635 F.3d 571, 574 (1st Cir. 2011) ("[P]laintiffs in this case complain that the prices for gasoline on Martha's Vineyard have been artificially high due . . . to an illegal price-fixing conspiracy . . . ."); *In re* Dig. Music Antitrust Litig., 812 F. Supp. 2d 390, 397 (S.D.N.Y. 2011) ("Plaintiffs allege that Defendants' motive to conspire was to support their ability to charge supracompetitive prices . . . .").

189 Weisfeld v. Sun Chem. Corp., 210 F.R.D. 136, 144 (D.N.J. 2002), *aff'd*, 84 F. App'x 257, 257 (3d Cir. 2004); *see, e.g.*, *In re* High-Tech Emp. Antitrust Litig., 985 F. Supp. 2d 1167, 1186 n.8 (N.D. Cal. 2013) (noting that class certification does not require proving that each element of the claim is susceptible to class-wide proof); *see also* Todd v. Exxon Corp., 275 F.3d 191, 202 n.5 (2d Cir. 2001)

Other antitrust classes have had more luck.[190] And outside of antitrust law, courts have been more willing to certify classes.[191] But the broader point stands. Because products are simpler and more homogenous than workers, product-side class actions will be more common than labor-side class actions.

Lack of information. Class action lawyers face another incentive to focus on product markets. Consumer prices are public information, and price increases frequently receive public attention.[192] Sellers may try to disguise price increases by reducing quality—for example, selling cereal in smaller boxes, offering more limited warranties for consumer electronics, increasing waiting times for consumer support, or breaking promises to protect data. But these quality variations also attract public attention, as consumers complain and the media catch on. In contrast, most employers keep aggregate wage information confidential, and while individual workers may report their wages to the media or to lawyers, the variations across an entire work force can more easily be kept secret. Yet without this information, lawyers may be reluctant to launch a class action.[193]

(noting the difficulties that plaintiffs will face in obtaining class certification because of differences among class members); Maderazo v. VHS San Antonio Partners, LP, No. SA-06-CA-535-OG, 2019 WL 4254633, at *9 (W.D. Tex. Jan. 22, 2019) (denying class certification because experts could not prove causal impact of alleged conspiracy); Reed v. Advocate Health Care, 268 F.R.D. 573, 592, 594 (N.D. Ill. 2009) (denying class certification because of variation in wages paid to class members); Fleischman v. Albany Med. Ctr., No. 1:06–CV–765, 2008 WL 2945993, at *6 (N.D.N.Y. July 28, 2008) ("Interchangeability and job mobility in the nursing profession, and the reasons affecting the wage of a particular nurse or class of nurses, though contested, involve too many variables and provide too much ambiguity to carry a motion for class certification on the issue of injury-in-fact."); *In re* Comp. of Managerial, Prof'l, & Tech. Emps. Antitrust Litig., No. 02–2924 (AET), 2003 WL 26115698, at *4 (D.N.J. May 27, 2003) (similar). However, other courts disagree.

190 Nitsch v. Dreamworks Animation SKG Inc., 315 F.R.D. 270, 317 (N.D. Cal. 2016) (animation workers); Cason-Merenda v. VHS of Mich., Inc., No. 06-15601, 2014 U.S. Dist. LEXIS 29447, at *2 (E.D. Mich. Mar. 7, 2014) (reinstating class certification order on remand following Sixth Circuit post-Comcast reversal); *In re High-Tech Emp. Antitrust Litig.*, 985 F. Supp. 2d at 1229 (high-tech employees); Cason-Merenda v. VHS of Mich., Inc., 296 F.R.D. 528, 549 (E.D. Mich. 2013) (nurse wages—Detroit); *Fleischman*, 2008 WL 2945993 at *7 (nurse wages—Albany).

191 *See* Michael Selmi & Sylvia Tsakos, *Employment Discrimination Class Actions After* Wal-Mart v. Dukes, 48 AKRON L. REV. 803, 830 (2015) (noting that lower courts who remain sympathetic to class action claims for employment discrimination find ways around *Wal-Mart*).

192 *See* COUNCIL OF ECON. ADVISERS, *supra* note 7, at 13.

193 We have heard this explanation in conversations with private litigators who have been involved in labor monopsony cases.

Arbitration clauses and the absence of natural corporate plaintiffs. A further problem for both consumer and employee class actions is that firms frequently use arbitration clauses to block class action litigation. The Supreme Court has validated this practice for antitrust claims.[194] However, these clauses cannot be used to block litigation brought by well-funded corporations that are not in privity with the firm in question, and hence antitrust cases brought by corporate plaintiffs can continue. These cases compose a large fraction of product-side litigation. But there are few such cases on the labor side.[195] A possible explanation is related to the small size of most labor markets. If a firm tries to raise entry barriers by tying up the local labor supply with noncompetes and other arrangements, then the plaintiff who sues that firm is likely to be itself a small firm. A large firm, such as a manufacturer, can locate factories elsewhere and thus is not constrained to compete in the local market. A firm that needs a local labor force to serve a local market will often be relatively small.

* * *

Antitrust law has failed workers. The problem is less the statutory law, which is broadly worded, than the doctrine developed by courts, which has been oriented toward product-market litigation, and the inexperience of judges and litigators with labor monopsony cases. The weakness of the law raises the suspicion that the wave of mergers that has taken place over the last several decades, as well as other anticompetitive practices, might have been partly driven by a corporate strategy of obtaining anticompetitive returns in labor markets. After all, if the government and private litigators are focused on product-market behavior, a rational profit-maximizing corporation would search out rents in labor markets. We now turn to some proposals for correcting this state of affairs.

III
PROPOSALS

We make four proposals. First, employees should be permitted to bring section 1 claims against employers based on parallelism. Second, employees should be given more latitude to bring section 2 claims against labor monopsonists. Third,

194 Am. Express Co. v. Italian Colors Rest., 570 U.S. 228, 234 (2013).

195 For a rare example, see Aya Healthcare Serices, Inc. v. AMN Healthcare, Inc., No. 17cv205-MMA (MDD), 2018 WL 3032552, at *3 (S.D. Cal. June 19, 2018).

the FTC and Justice Department should incorporate labor-market analysis into their review of mergers, and private claims by employees against merging firms should also be strengthened. Fourth, employers should not be permitted to foreclose antitrust class actions by including arbitration clauses in employment contracts.

A. Section 1

1. *Parallelism*

Black letter law says that plaintiffs cannot advance a claim against antitrust defendants based on mere "parallelism" or "conscious parallelism."[196] Parallelism occurs when two or more competitors maintain above-competitive prices by (for example) adopting pricing strategies of matching the other party's price. They keep prices high through unilateral behavior rather than through agreement. Many commentators have criticized this legal rule because it allows firms to engage in anticompetitive conduct that hurts buyers.[197] The Supreme Court has, however, adamantly resisted calls for reform. The problem, first identified by Donald Turner, is that there is no clear judicially manageable remedy for parallelism.[198] A court could issue an injunction requiring the defendants not to engage in parallel pricing, but it would be hard to determine whether they are or not. It is in the nature of pricing that the seller must pay attention to the prices of other sellers, and a court would normally be unable to determine what the competitive price is. By contrast, if an agreement exists, the court can enjoin it and punish the parties for entering the agreement.

A similar point could be made about parallel wage setting. Imagine that one firm announces the wages that it pays its workers, and other firms match the wage. Workers at one or all the firms sue, arguing that the firms coordinate to keep wages low. A court might have difficulty fashioning a remedy for the same reason as in the case of parallel pricing: it may be impossible for the court to determine whether a firm ignores or pays attention to the wages of other firms and to issue an enforceable order directing the defendants to ignore them. But the logic does not apply in all settings. Consider, for example, another

196 *See* HORIZONTAL MERGER GUIDELINES, *supra* note 35, § 7; William H. Page, *Tacit Agreement Under Section 1 of the Sherman Act*, 81 ANTITRUST L.J. 593, 594–(2017).

197 LOUIS KAPLOW, COMPETITION POLICY AND PRICE FIXING 443–53 (2013).

198 Donald F. Turner, *The Definition of Agreement Under the Sherman Act: Conscious Parallelism and Refusals to Deal*, 75 HARV. L. REV. 655, 669–71 (1962).

common form of parallel behavior—nonpoaching. Firm A does not hire from Firm B, and Firm B does not hire from Firm A. It is likely that if Firm A and Firm B both employ large workforces and frequently hire people, a plaintiff could establish with statistical methods that Firm A turns down qualified applicants from Firm B—that is, applicants who are as qualified as the applicants from outside Firm B that Firm A hires. An antitrust violation thus could be established, and an appropriate remedy—based on the but-for world in which Firm A uses the same standards for all applicants—could be formulated. Indeed, the same tools that are used to show invidious discrimination in a disparate impact employment discrimination case could be used in the antitrust context.[199]

For an example, consider *Kelsey K. v. NFL Enterprises LLC*, where the court rejected both a no-poaching and wage-setting allegation based on parallel conduct.[200] The plaintiffs, a class of cheerleaders, tried to establish the no-poaching allegation by pointing out that no club had ever hired a cheerleader away from another club even though the skills employed by cheerleaders are easily transferred from one team to another.[201] The court held that the refusal to hire could have been merely parallel conduct—an agreement was not necessary.[202] The court should have taken the no-poaching allegation more seriously. The problem of proof and remedy in the price-setting and possibly wage-setting context was not present in this case. If cheerleaders routinely applied for positions at other clubs and were routinely refused, this should be a prima facie case of a section 1 violation. The teams could defend themselves by showing that they had applied the same employment criteria to applicants who belonged to other clubs and applicants who did not.

An employer can rebut a disparate impact claim by showing, using statistical methods, that the low representation of a group in its labor force reflects demographic constraints, for example, the low representation of that group in the labor market from which the employer draws.[203] When a plaintiff claims parallel or reciprocal no-poaching, the employer would similarly be able to rebut the claim by showing that its labor force has the same proportion of former employees from the plain-

199 *See* Griggs v. Duke Power Co., 401 U.S. 424, 431–32 (1971).
200 No. C 17-00496 WHA, 2017 WL 3115169, at *6 (N.D. Cal. July 21, 2017), *aff'd*, 757 F. App'x 524, 526 (9th Cir. 2018).
201 *See id.* at *4.
202 *Id.* at *6.
203 *Griggs*, 401 U.S. at 430 n.6 (pointing out that between whites and blacks, many fewer blacks had the high school education required by the employer).

tiff's employer as from other employers, controlling for other variables.

A flat ban on labor-side antitrust cases brought on the basis of parallel practices is unwise. Courts should recognize section 1 cases based on parallelism when statistical analysis shows that the parallel behavior harms labor competition.

2. *No-Poaching Agreements in Franchises*

In the last year, plaintiffs have brought class actions on behalf of workers at franchises like McDonald's and Jimmy John's, arguing that these franchises have used no-poaching agreements in order to suppress competition.[204] The McDonald's no-poaching agreement reads:

> *Interference With Employment Relations of Others.* During the term of this Franchise, Franchisee shall not employ or seek to employ any person who is at the time employed by McDonald's, any of its subsidiaries, or by any person who is at the time operating a McDonald's restaurant or otherwise induce, directly or indirectly, such person to leave such employment. This paragraph [ ] shall not be violated if such person has left the employ of any of the foregoing parties for a period in excess of six (6) months.[205]

A franchise that violates this provision is subject to a range of sanctions from McDonald's, including termination if repeated violations occur.[206] In the McDonald's case, the class representative, Leinani Deslandes, alleged that she was employed by a McDonald's franchise in a managerial position for $12 per hour.[207] After her original employer frustrated her efforts to obtain training for a higher-level position, she applied for a managerial job at a nearby McDonald's restaurant that offered $13.75 per hour, rising to $14.75 after three months. The store manager expressed interest in Deslandes' application, but she was later told by a McDonald's official that the store could not hire her without the consent of her original employer, who refused it because she was "too valuable."[208] She eventually quit and went to work for Hobby Lobby for $10.25 per hour, the lower wage reflecting the fact that "some of the skills [Deslandes] developed as a manager of a McDonald's outlet

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204 *See, e.g.*, Butler v. Jimmy John's Franchise, LLC, 331 F. Supp. 3d 786, 790 (S.D. Ill. 2018); Deslandes v. McDonald's USA, LLC, No. 17 C 4857, 2018 WL 3105955, at *6 (N.D. Ill. June 25, 2018).

205 *Deslandes*, 2018 WL 3105955, at *2 (brackets in original).

206 *Id.*

207 *Id.* at *3.

208 *Id.*

were not transferable to management positions at employers outside of the McDonald's brand, so she had to start over at the bottom elsewhere."[209]

The franchise cases raise several novel issues for antitrust law. First, when the franchisor imposes within-franchise no-hire obligations on the franchisees, do these obligations count as vertical agreements or horizontal agreements? If they are vertical agreements, then they are subject to the rule of reason standard, which favors the franchise.[210] If they are horizontal agreements, they are presumptively subject to the per se standard, which favors the employees.[211] Antitrust policy reflects deep skepticism of agreements between competitors, while agreements among firms in different positions on a distribution chain may produce efficiencies.[212] In the *Jimmy John's* case, the court seized on the contractual right of franchisees to sue each other for violating the no-poaching obligation, which has a horizontal feel.[213] Unfortunately, the distinction between horizontal agreements and vertical agreements is hopelessly tangled. The type of formalism employed by the *Jimmy John's* court will simply cause firms to rewrite the franchise contractor so that the franchisor alone enforces the obligations.

Second, does it matter that these agreements are "intrabrand," that is, between firms that are contractually bound by the franchise agreement rather than between independent firms? In product market cases, agreements that restrict trade within a brand are not subject to per se analysis because they can facilitate competition across brands.[214] If McDonald's owned all its restaurants rather than contracted with franchisees, then it would be impossible to argue that restrictions on employee mobility would violate the antitrust laws, which do not apply internally to the operation of a firm.[215] Why should matters change if McDonald's operates through franchises? One possibility is that unions can more easily organize against a single large firm than multiple independent franchises; thus, it might seem fair that if McDonald's can counter unionization

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209 *Id.*

210 *See, e.g.*, Butler v. Jimmy John's Franchise, LLC, 331 F. Supp. 3d 786, 793 (S.D. Ill. 2018) ("Vertical agreements, however—those made up and down the supply chain—are generally subject to a more lenient 'rule of reason' analysis . . . .").

211 *See id.* at 792 ("Horizontal agreements . . . are typically per se violations of Section 1 . . . .").

212 *See* Hovenkamp, *supra* note 97, at 156–59.

213 *Butler*, 331 F. Supp. 3d at 796.

214 Cont'l T. V., Inc. v. GTE Sylvania Inc., 433 U.S. 36, 54–55 (1977).

215 *See* Copperweld Corp. v. Indep. Tube Corp., 467 U.S. 752, 776 (1984).

by organizing itself as a franchise, it should be subject to antitrust law. But it seems to us that one cannot answer this question without examining the market conditions in which McDonald's operates.

Third, and getting closer to these economic realities, one needs to ask whether these no-poaching obligations are likely to be pro- or anticompetitive. The McDonald's court made several pertinent observations. McDonald's' no-poaching agreement applied to low-skill workers as well as managerial workers, and it applied to workers whose training took place in the distant past as well as workers whose training was recent.[216] Thus, it was not tailored to the presumed business justification—to protect each restaurant's investment in its employees' training. Moreover, "[g]iven that most individuals in the low-skill employment market do not have the luxury of being unemployed by choice for six months, the no-hire provision effectively prevented competing McDonald's franchises (as well as the company-owned stores) from competing for experienced, low-skill employees."[217]

This type of analysis begins to look like a rule of reason analysis. McDonald's could insist that Deslandes show that the labor market was concentrated because if it were not, Deslandes could have found an equally good job. The low Hobby Lobby wage might simply have shown that she did not look hard enough, or that she valued other amenities at Hobby Lobby more than the lost income. As a first step in refuting this argument, Deslandes would need to show that the labor market was concentrated. While this would not necessarily be difficult, the court noted that "allegations of a large number of geographically-small relevant markets might cut against class certification."[218] And if a class cannot be certified, we can be sure that Deslandes' claim, however meritorious, will never be vindicated. Even trebled, $2.75 per hour in damages will not finance a single expert report on market conditions.

Thus, the law may be inadequate to the job of policing labor market conditions. We suggest a few strategies for addressing this problem. First, courts should accept commuting zones for the purpose of labor market definition in section 1 cases. This would address the class certification problem noted by the McDonald's court. Second, courts should keep an

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216 Deslandes v. McDonald's USA, LLC, No. 17 C 4857, 2018 WL 3105955, at *8 (N.D. Ill. June 25, 2018).

217 *Id.* at *1.

218 *Id.* at *8.

eye out, as the McDonald's court did, for no-poaching obligations in franchise contracts that are untailored to the skill-level and responsibility of employees or that apply to low-skill employees. Within-franchise no-poaching obligations may be justified in narrow cases, for example, involving managerial employees who are given access to proprietary information about the franchise's method of business or who have received intensive training at the franchise level; when they are broad, they should trigger the per se rule. This approach seems to us more fruitful than the tangle over vertical versus horizontal restrictions.[219]

3. *Why Section 1 Standards Should Be Relaxed for Labor Markets*

Our two section 1 proposals imply that section 1 standards should be relaxed when workers challenge a labor monopsony. But why exactly? One might believe that section 1 should be applied to labor markets in the same way as it is applied to product markets.

The answer is that collusion appears to be easier in labor markets than in product markets, because labor markets are often more concentrated than product markets are. The idea that collusion is easier in more concentrated markets is one of the main justifications for hostility toward mergers in already concentrated markets, which is embodied in the *Horizontal Merger Guidelines*.[220]

Consider a product-side duopoly in which two firms maintain prices through parallel behavior. Each firm must still worry that the other firm will compete on quality or service or by offering secret discounts. In contrast, the two firms in a labor-side duopoly know that each firm's labor force is unlikely to switch firms—because of search frictions and job differentiation as well as the lack of competition by other employers. Firms cannot compete much on quality because working conditions are fairly uniform—they are not constantly changing as a result of new technology the way that products are. And while firms can compete for workers by offering signing bonuses, they take the risk that they will offend pay equity norms

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[219] It also brings the analysis of no-poaching agreements in line with the treatment of covenants-not-to-compete, which are usually unenforceable when they are untailored and almost always unenforceable when imposed on low-skill workers. *See* RESTATEMENT (SECOND) OF CONTRACTS § 188 (AM. LAW. INST. 1981); *id.* cmts. c, d.

[220] *See* HORIZONTAL MERGER GUIDELINES, *supra* note 35, § 7 (discussing coordinated effects in concentrated markets).

if the bonuses become widely known[221]—as they must if serious competition is going to take place. Thus, the more reliable form of competition is through the wage, and parallel behavior can stop it.

The greater risk of collusion in labor markets because of their high level of concentration justifies relaxed standards for section 1 in labor market cases because the risk of false positives—wrongfully imposed antitrust liability—is correspondingly lower than in section 1 product market cases.

B. Monopsony

Section 2 also needs to be reformed. The problem is not the statutory language but the paucity of cases that provide guidance for employees who are the victims of anticompetitive behavior by monopsonists. To remedy this problem, we suggest that Congress pass a more detailed version of section 2 as applied to labor monopsonists.[222] The law should include the following reforms.

Labor market definition. Plaintiffs would be permitted to allege labor markets based on the six-digit SOC and a commuting zone. If plaintiffs allege such a labor market, the burden would switch to the defendant to show that the labor market definition is inappropriate.

By standardizing the labor market definition, the proposal would make it easier for plaintiffs to survive motions to dismiss and certify class actions. By creating a presumption that is rebuttable, the proposal would enable defendants to prevail when labor markets are idiosyncratic. In rare cases when labor markets are national in scope, for example, the labor market for CEOs of large firms, an employer would be able to refute a labor market definition based on a commuting zone by providing evidence that workers send significantly more than 20% of their applications outside the commuting zone. (Research shows that workers who seek jobs on average send 20% of their applications outside the commuting zone.)[223] So we would require evidence that the job search in this occupation is significantly broader than average.

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221 David Card, Alexandre Mas, Enrico Moretti & Emmanuel Saez, *Inequality at Work: The Effect of Peer Salaries on Job Satisfaction*, 102 AM. ECON. REV. 2981, 3001–02 (2012) (finding that workers dislike pay inequality within firms when paid below the median for their unit and occupation).

222 For details of the proposal and a discussion, see Marinescu & Posner, *supra* note †, at 8–18.

223 *See* Marinescu & Rathelot, *supra* note 127, at 47 fig. 1.

Labor market power. Plaintiffs would satisfy the market power requirement that is typically imposed in section 2 cases by proving that the employer has a "large" share of the labor market. How large is "large"? On the product market side, courts nearly always accept 90%, usually accept above 70%, and occasionally accept shares around 50% or higher.[224] We think that similar figures could be used for the labor market side. Plaintiffs could satisfy these requirements in either of two ways: based on the employer's percentage of employment or based on the employer's percentage of job postings.

This reform would again simplify and render more predictable labor monopsony cases.

Anticompetitive behavior. Plaintiffs would be able to base their case on any of the following anticompetitive acts: mergers in highly concentrated markets; use of noncompete and related clauses; restrictions on employees' freedom to disclose wage and benefit information; unfair labor practices under the National Labor Relations Act;[225] misclassification of employees as independent contractors; no-poaching, wage-fixing, and related agreements that are also presumptively illegal under section 1; and prohibitions on class actions. Of course, current law gives employees the theoretical right to allege these types of anticompetitive behavior, but the cases show a pattern of judicial skepticism, as noted earlier.[226] Codification would help employees by compelling courts to take these claims seriously. Employers would be allowed to rebut a prima facie case of anticompetitive behavior by showing that the act in question would likely lead to an increase in wages.

This reform would strengthen and extend section 2 actions against labor monopsonists by standardizing a list of anticompetitive acts. While not all of these acts are invariably anticompetitive, the employer would be able to defend itself by citing a

224 *See, e.g.*, Colo. Interstate Gas Co. v. Nat. Gas Pipeline Co. of Am., 885 F.2d 683, 694 n.18 (10th Cir. 1989) ("[L]ower courts generally require a minimum market share of between 70% and 80%.").

225 29 U.S.C. §§ 151–169 (2018). The Supreme Court expressed skepticism when a union brought an antitrust case against an employer who had tried to divert business to entities it controlled that were not unionized, allegedly to weaken the bargaining power of the union. The Court commented that this behavior "might constitute . . . an unfair labor practice . . . but in the context of the bargaining relationship between the parties to this litigation, such activities are plainly not subject to review under the federal antitrust laws." Associated Gen. Contractors of Cal., Inc. v. Cal. State Council of Carpenters, 459 U.S. 519, 526–27 (1983). While the relationship between labor law and antitrust law is complex, we do not think antitrust claims should be ruled out when the alleged anticompetitive act is also an unfair labor practice.

226 *See supra* note 178 and accompanying text.

business justification. For example, a noncompete could be justified because it protects an employer's investment in training. If so, an employer could avoid antitrust liability by showing that its use of noncompetes benefits workers, who obtain higher wages as a result of their training.[227]

Statutory damages. To increase incentives to bring labor-side antitrust actions, employees would be entitled to the greater of damages of $10,000 per employee or the harm imposed on each employee.

These reforms would strengthen section 2 claims against labor monopsonies but would also preserve the doctrinal structure of section 2. Thus, they would not generate significant legal uncertainty or require a revision in the way that we think about antitrust law.

C. Merger Review

As we have argued elsewhere, the DOJ and FTC should review mergers for their labor-market effects as well as for their product-market effects.[228] Under the current approach, the agencies focus exclusively on the product market.[229] They first determine the HHI of the product market.[230] Then they calculate the HHI of the post-merger product market. If the initial HHI and the increase in the HHI are high, the merger is deemed presumptively illegal. The merging firms may nonetheless obtain approval if they can show that the merger will produce significant efficiency benefits (typically, through the exploitation of economies of scale) so that consumer prices will decline.

Roughly the same analysis can be used on the labor market side. The agencies should calculate the HHI of the labor market in which the firms operate and the increase in HHI post-merger. If HHI and the HHI increase are sufficiently high, then the merger should be presumptively blocked. The merger would nonetheless be approved if the firms can show that the merger would allow them to obtain efficiencies that would result in a wage increase.

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227 For evidence that noncompetes harm workers in monopsonistic labor markets and not in more competitive labor markets, see Starr et al., *supra* note 4, at 28–29.

228 Marinescu & Hovenkamp, *supra* note 21, at 1042; Naidu, Posner & Weyl, *supra* note 11, at 547–49. Both papers go into significantly more detail about how merger review should be conducted, and readers interested in those details should consult them.

229 *See* HORIZONTAL MERGER GUIDELINES, *supra* note 35, § 4.

230 *See id.* § 5.3.

Note that the labor-market effects would need to be determined for every market in which the firm employs workers. A large national firm that employs workers in many different commuting zones would need to show that concentration is not significant, or would not significantly increase, in all of those zones—or otherwise spin off separate employers in the zones in which concentration would be unacceptable. This would parallel the practice for product market mergers—for example, when nationwide retail chains merge, and the implications for concentration are examined in every geographic product market in which stores are located.

Finally, Congress should abrogate *United States v. American Building Maintenance Industries*, the case that interpreted the Clayton Act not to apply to within-state mergers.[231] Plaintiffs should be allowed to challenge such mergers.

While analysis of labor market effects is complex and many mergers are justified,[232] our proposal simply extends the current product-market approach to labor markets. This reform is long overdue.

D. Arbitration Clauses

In *American Express Co. v. Italian Colors Restaurant*, the Supreme Court held that firms could use arbitration clauses to block class actions in antitrust cases.[233] That case involved a product-side market. Merchants who claimed that American Express had violated antitrust law were required to honor the arbitration clauses in the contracts they had signed with American Express. The Court recognized that these clauses might prevent victims of corporate wrongdoing from vindicating claims involving small sums but considered itself bound by the policy of the Federal Arbitration Act.[234] The logic of the case suggests that it applies to labor settings as well, as the Court later acknowledged.[235] Employers can (and do) easily insert arbitration clauses in employment contracts for the purpose of

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231 *See* United States v. Am. Bldg. Maint. Indus., 422 U.S. 271, 285–86 (1975).

232 *See* David P. Wales et al., *The Unlikely Role of Labor Markets in Merger Antitrust Review*, BLOOMBERG L., (Nov. 23, 2018, 9:00 AM), https://news.bloomberglaw.com/mergers-and-antitrust/insight-the-unlikely-role-of-labor-markets-in-merger-antitrust-review?context=search&index=0 [https://perma.cc/9JZ4-RVPD].

233 570 U.S. 228, 233, 235–36 (2013).

234 *Id.* at 235–38.

235 *See* Epic Sys. Corp. v. Lewis, 138 S. Ct. 1612, 1627 (2018).

defeating class action litigation based on antitrust claims—and they have done so with increasing frequency in recent years.[236]

Italian Colors was an enormous setback to antitrust litigation. It allows a monopolist (or monopsonist) to immunize itself from antitrust challenges by contractual partners by demanding that they sign an arbitration agreement. The problem—which is familiar from many different antitrust settings—is that it may be individually rational for a single buyer or seller to agree to an arbitration clause that forecloses antitrust liability because part of the harm is borne by third parties—including potential rivals of the monopolist and their future customers.

The problem is even more serious for labor-side antitrust because nearly all such cases are brought by workers who have contractual relationships with employers. In contrast, a great deal of product-side litigation is brought by corporate plaintiffs—including contractual parties who are large enough to reject arbitration clauses and competitors and other companies that do not have contractual relationships with the antitrust violator. Thus, we propose that Congress pass a law abrogating *Italian Colors* for labor monopsony cases.

CONCLUSION

Adam Smith, the patron saint of free-market economics, could have been writing today when he set down these words about labor monopsony more than two centuries ago:

> We rarely hear, it has been said, of the combinations of masters; though frequently of those of workmen. But whoever imagines, upon this account, that masters rarely combine, is as ignorant of the world as of the subject. Masters are always and every where [sic] in a sort of tacit, but constant and uniform combination, not to raise the wages of labour above their actual rate. To violate this combination is every where [sic] a most unpopular action, and a sort of reproach to a master among his neighbours and equals. We seldom, indeed, hear of this combination, because it is the usual, and one may say, the natural state of things which nobody ever hears of. Masters too sometimes enter into particular combinations to sink the wages of labour even below this rate. These are always conducted with the utmost silence and secrecy, till the moment of execution, and when the workmen yield, as they sometimes do, without resistance, though se-

236 ALEXANDER J.S. COLVIN, ECON. POLICY INST., THE GROWING USE OF MANDATORY ARBITRATION 5–6 (2018), https://www.epi.org/publication/the-growing-use-of-mandatory-arbitration-access-to-the-courts-is-now-barred-for-more-than-60-million-american-workers/ [https://perma.cc/QFR9-TK83].

> verely felt by them, they are never heard of by other people.[237]

While employment markets have changed greatly since the eighteenth century, the employer combinations identified by Adam Smith were aided by an essential condition—the concentration of labor markets—that has not changed. These hidden employer combinations occasionally rise to public attention because of a scandal like the high-tech no-poaching agreements but are largely invisible, or were—until statistical research brought them to light.

In light of the statistical evidence, we know that a litigation gap exists: antitrust law neglects labor monopsony—a severe problem that calls out for public resources—and it should not. Using product-market litigation as a baseline, we show that the amount of labor-market litigation falls far short of what one could reasonably expect.

The explanation for this state of affairs is not simple. Many factors play a role—the state of economic wisdom until recently, the development of new datasets and modes of statistical analysis, the incentives of class action lawyers, the limits of antitrust law, among other things. As economic understanding of labor monopsony advances, the law needs to catch up.

Courts should recognize certain types of conscious parallelism as unlawful under section 1 despite their normal insistence on an agreement on the product side. They should also block firms from avoiding section 1 liability by exploiting the vertical nature of the franchise form. Congress should tighten up section 2—courts and lawyers can do their part as well by using the latest economic wisdom to evaluate labor monopsony cases. The FTC and the Justice Department should review mergers for labor market effects. And Congress should block employers from using arbitration clauses to protect themselves from antitrust class actions.

Legal academics also need to catch up. The imbalance between product-market litigation and labor-market litigation is matched by an imbalance in legal research on product-market antitrust (which is voluminous) and legal research on labor-market antitrust (which is puny).[238] We have scratched the surface of a vast topic that would benefit greatly from additional research by legal scholars.

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237 ADAM SMITH, AN INQUIRY INTO THE NATURE AND CAUSES OF THE WEALTH OF NATIONS 70–71 (1776).

238 We have thumbed through numerous antitrust treatises and student guides and found virtually no mention of labor monopsony.

Noncompetes and Other Post-Employment Restraints on Competition: Empirical Evidence from Trade Secret Litigation

CHRISTOPHER B. SEAMAN[†]

Noncompete clauses in employment agreements are both common and controversial. An estimated twenty-eight million Americans—nearly twenty percent of the U.S. workforce—are currently bound by a noncompete. The traditional view that noncompete agreements can facilitate increased productivity by encouraging employers to invest in employee training has been challenged by numerous legal and economics scholars in recent years, who contend noncompetes hinder employment options for skilled workers and limit information spillovers, which are both vital drivers of innovation. Based on these claims, several states have recently limited the enforcement of noncompetes, and legislation is pending at the federal level to effectively ban noncompete agreements for certain types of workers.

Despite their widespread use, empirical research regarding noncompetes is fragmented and incomplete. In particular, there have been few empirical studies based on actual employment agreements. This Article helps fill an important gap in the existing literature. Using a novel dataset of noncompete agreements that have been publicly disclosed in trade secret litigation in federal court, it finds that noncompetes are more frequently enforced against technical and sales personnel, instead of high-ranking corporate executives. In addition, it finds that noncompetes are common for employees with a base salary below $100,000 per year and that California-based employees are significantly less likely to be bound by a noncompete. The implications of these and other findings from the dataset are discussed in the final Part of the Article.

[†] Associate Professor of Law and Director, Frances Lewis Law Center. Email: seamanc@wlu.edu. I thank participants of the Intellectual Property and Information Ecosystem panel at the 2018 Southeastern Association of Law Schools annual conference, the Sixth Annual Roundtable on Empirical Methods in Intellectual Property at the U.S. Patent and Trademark Office, the Trade Secrets Roundtable at Washington and Lee University, and a faculty workshop at American University Washington College of Law for their feedback on this project. I gratefully acknowledge the invaluable research assistance of Matt Dare, Brandon Howell, Alexandra (Sasha) Hoyt, and Taylor Lawrence. I also thank the student editors of the *Hastings Law Journal* for their skill and assistance in editing this Article and shepherding it to publication. This Article and the creation of the underlying dataset was supported by a research grant from the Frances Lewis Law Center at Washington and Lee University School of Law.

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INTRODUCTION

Contractual provisions that limit an employee's ability to compete with a former employer are both common and controversial.[1] An estimated twenty-eight million employees—nearly twenty percent of the U.S. labor force—are currently bound by a noncompete agreement.[2] Although existing research suggests covenants not-to-compete and other post-employment restraints on competition, such as non-solicitation agreements, are more common among highly-skilled employees,[3] they occur at all levels of the workforce. News stories have highlighted the use of noncompetes in low-wage, low-skill positions,[4] including fast food employees,[5] pet sitters,[6] beauticians,[7] exterminators,[8] camp

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1. *See, e.g.*, Norman D. Bishara, Kenneth J. Martin & Randall S. Thomas, *An Empirical Analysis of Noncompetition Clauses and Other Restrictive Postemployment Covenants*, 68 VAND. L. REV. 1, 5 (2015) ("Restrictive covenants remain controversial today, even as they have seemingly proliferated among employers.") (footnote omitted); Gillian Lester, *Restrictive Covenants, Employee Training, and the Limits of Transaction-Cost Analysis*, 76 IND. L.J. 49, 49 (2001) (explaining that "restrictive covenant[s] prohibit[ing] an employee from competing with the employer within a certain geographic area for a specified time period after departure" are "an increasingly common feature of employment, used across a wide range of industries, occupations, and employees"); Viva R. Moffat, *The Wrong Tool for the Job: The IP Problem with Noncompetition Agreements*, 52 WM. & MARY L. REV. 873, 876 (2010) ("As the use of noncompetes has become more widespread, controversy over these agreements has also increased.").

2. Evan Starr, J.J. Prescott & Norman Bishara, *Noncompete Agreements in the U.S. Labor Force*, J.L. & ECON. (forthcoming 2021) (manuscript at 5), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2625714.

3. *Id.* at 6–7.

4. *See* Sophie Quinton, *These Days, Even Janitors Are Being Required to Sign Non-Compete Clauses*, USA TODAY (May 27, 2017, 8:28 AM), https://www.usatoday.com/story/money/2017/05/27/noncompete-clauses-jobs-workplace/348384001 ("Big companies often ask top executives who have access to confidential business information to sign noncompete agreements. But low-wage, unskilled laborers such as janitors, landscapers and entry-level health workers are often asked to sign them, too.").

5. In one well-publicized example, the sandwich chain Jimmy John's required its "sandwich makers" to agree not to work at a "competitor" (which it broadly defined as any business that "derives more than ten percent (10%) of its revenue from selling submarine, hero-type, deli-style, pita and/or wrapped or rolled sandwiches" that is "located with [sic] three (3) miles" of any Jimmy John's store) for two years after employment. Dave Jamieson, *Jimmy John's Makes Low-Wage Workers Sign 'Oppressive' Noncompete Agreements*, HUFFPOST (Oct. 15, 2014), https://www.huffpost.com/entry/jimmy-johns-non-compete_n_5978180. After litigation, Jimmy John's agreed that it would not enforce noncompetes for all current and former employees and to remove them from training materials for new hires. *See* Samantha Bomkamp, *Jimmy John's Agrees to Pay $100,000 to Illinois AG over Noncompete Contracts*, CHI. TRIB. (Dec. 7, 2016, 2:11 PM), http://www.chicagotribune.com/business/ct-jimmy-johns-settlement-1208-biz-20161207-story.html.

6. *See, e.g.*, Dave Jamieson, *Doggy Day Care Chain Makes Pet Sitters Sign Noncompetes to Protect 'Trade Secrets'*, HUFFPOST (Nov. 24, 2014, 7:31 AM), https://www.huffpost.com/entry/camp-bow-wow_n_6207544; *see also* Paw Shop, LLC v. Mestre, No. 601950/08, 2008 WL 8675213 (N.Y. Sup. Ct. Oct. 28, 2008) (granting a preliminary injunction that prohibited a former employee from providing dog walking services to owners whose pets were serviced by the plaintiff within a ten mile radius of the former employer's stores based on a noncompete agreement).

7. *See, e.g.*, Koby Levin, *As Non-Compete Agreements Proliferate, So Do Lawsuits*, ASSOCIATED PRESS (Mar. 22, 2018), https://www.apnews.com/70f0855282de4329908957fa7b1e278d (describing a noncompete that prevented a hair stylist in Missouri from accepting a position with another salon).

8. *See, e.g.*, Paramount Termite Control Co. v. Rector, 380 S.E.2d 922, 925–26 (Va. 1989) (upholding a noncompete agreement prohibiting a pest control worker from working for a competitor for two years after termination of employment), *overruled by* Home Paramount Pest Control Companies, Inc. v. Shaffer, 718 S.E.2d 762 (Va. 2011).

counselors,[9] and college interns.[10] These restraints may adversely impact workers' ability to negotiate with their existing employer and to switch positions, potentially depressing wages and decreasing labor mobility.[11]

There are divergent theories regarding the impact of noncompetes and other post-employment restraints on innovation. The historically dominant view is that noncompetes can facilitate innovation by incentivizing firms to invest in employee training, fostering the dissemination of information within the firm, and preventing the unauthorized disclosure of trade secrets and other valuable business information.[12] Under this approach, the reasonableness standard for evaluating the enforceability of noncompetes[13]—which remains the predominant approach in most jurisdictions[14]—adequately protects their benefits to employers while also reducing the negative impact on employees by constraining contractual overreach.

More recently, however, some legal and economics scholars contend that noncompete agreements are generally detrimental to innovation. For example, in a well-known and influential study, Ronald Gilson compared innovation in California's Silicon Valley to Massachusetts's Route 128 corridor and attributed Silicon Valley's success to California's refusal to enforce noncompetes in most circumstances.[15] Building on this work, scholars like Orly Lobel and Viva Moffat have argued that noncompete agreements and other post-employment restraints unduly hinder employment options for skilled workers, who are a critical source of talent and new ideas.[16] In their view, noncompetes effectively

9. *See, e.g.*, Steve Greenhouse, *Noncompete Clauses Increasingly Pop Up in Array of Jobs*, N.Y. TIMES (June 8, 2014), https://www.nytimes.com/2014/06/09/business/noncompete-clauses-increasingly-pop-up-in-array-of-jobs.html (describing a noncompete clause that prohibited a nineteen-year-old college student from working as a camp counselor at a nearby competing camp).

10. *See, e.g.*, Jack Chapman, *What If They Want Me to Sign a Non-Compete Agreement?*, LADDERS (Feb. 27, 2020), https://www.theladders.com/career-advice/they-want-me-to-sign-a-non-compete-agreement (describing a case where a college student was blocked from accepting employment with the client of an advertising agency that she had interned with due to a noncompete agreement).

11. *See* WHITE HOUSE, NON-COMPETE AGREEMENTS: ANALYSIS OF THE USAGE, POTENTIAL ISSUES, AND STATE RESPONSES 2 (2016), https://obamawhitehouse.archives.gov/sites/default/files/non-competes_report_final2.pdf.

12. *See generally* Harlan M. Blake, *Employee Agreements Not to Compete*, 73 HARV. L. REV. 625 (1960); Edmund W. Kitch, *The Law and Economics of Rights in Valuable Information*, 9 J. LEGAL STUD. 683 (1980); Paul H. Rubin & Peter Shedd, *Human Capital and Covenants Not to Compete*, 10 J. LEGAL STUD. 93 (1981).

13. The reasonableness standard for noncompetes can be traced to the landmark English decision in *Mitchel v. Reynolds* (1711) 24 Eng. Rep. 347; 1 P. Wms. 181. *See* Jonathan M. Barnett & Ted Sichelman, *The Case for Noncompetes*, 87 U. CHI. L. REV. 953, 958 (2020).

14. California is the obvious counterexample. *See infra* notes 48–51 and accompanying text.

15. *See generally* Ronald J. Gilson, *The Legal Infrastructure of High Technology Industrial Districts: Silicon Valley, Route 128, and Covenants Not to Compete*, 74 N.Y.U. L. REV. 575 (1999); ANNALEE SAXENIAN, REGIONAL ADVANTAGE: CULTURE AND COMPETITION IN SILICON VALLEY AND ROUTE 128 (1994). *But see* Barnett & Sichelman, *supra* note 13, at 978–1007 (critiquing conventional views of the Silicon Valley versus Route 128 comparison and suggesting that other legal constraints on labor mobility, such as trade secret and ERISA litigation, undermine this narrative).

16. *See, e.g.*, ORLY LOBEL, TALENT WANTS TO BE FREE: WHY WE SHOULD LEARN TO LOVE LEAKS, RAIDS, AND FREE RIDING (2013); Moffat, *supra* note 1, at 893–97; Viva R. Moffat, *Making Non-Competes Unenforceable*, 54 ARIZ. L. REV. 939, 984 (2012).

serve as human capital controls.[17] Ultimately, critics of noncompetes argue that they stifle rather than promote innovation, which in turn can negatively impact economic growth.[18] In addition, some economists and business law scholars have conducted studies which suggest that noncompetes adversely affect the mobility of skilled labor.[19] In light of these critiques, legislation has been introduced in Congress to significantly restrict the enforcement of noncompetes,[20] and the Federal Trade Commission (FTC) recently held a public hearing regarding their potential anticompetitive effects.[21] Furthermore, numerous states recently have enacted laws curtailing noncompetes, often by prohibiting their application to lower-income workers.[22]

17. *See* Orly Lobel, *The New Cognitive Property: Human Capital Law and the Reach of Intellectual Property*, 93 TEX. L. REV. 789, 790 (2015) (describing "postemployment restrictions, including noncompetition contracts, nonsolicitation, nonpoaching, and antidealing agreements" as forms of "contractual controls on human capital"); Viva R. Moffat, *Human Capital as Intellectual Property? Non-Competes and the Limits of IP Protection*, 50 AKRON L. REV. 903, 907 (2017) ("The subject matter of non-competes is people—human beings—and the goal of those agreements is to control that human capital.").

18. *See infra* notes 77–84 and accompanying text.

19. *See, e.g.*, Matt Marx, Deborah Strumsky & Lee Fleming, *Mobility, Skills, and the Michigan Non-Compete Experiment*, 55 MGMT. SCI. 875 (2009) (using change in noncompete law in Michigan during the 1980s as a natural experiment and finding a statistically significant decrease in labor mobility among Michigan inventors) [hereinafter Marx et al., *The Michigan Non-Compete Experiment*]; Matt Marx, Jasjit Singh & Lee Fleming, *Regional Disadvantage? Employee Non-Compete Agreements and Brain Drain*, 44 RSCH. POL'Y 394 (2015) (finding that noncompetes drive skilled worked to states that decline to enforce such agreements) [hereinafter Marx et al., *Regional Disadvantage?*]; Sampsa Samila & Olav Sorenson, *Noncompete Covenants: Incentives to Innovate or Impediments to Growth*, 57 MGMT. SCI. 425 (2011).

20. *See, e.g.*, Workforce Mobility Act of 2020, H.R. 5710, 116th Cong. (2020); Workforce Mobility Act of 2019, S. 2614, 116th Cong. (2019); Workforce Mobility Act of 2018, S. 2782, 115th Cong. (2018); Workforce Mobility Act of 2018, H.R. 5631, 115th Cong. (2018).

21. *Non-Competes in the Workplace: Examining Antitrust and Consumer Protection Issues*, FED. TRADE CMM'N, https://www.ftc.gov/news-events/events-calendar/non-competes-workplace-examining-antitrust-consumer-protection-issues (last visited Apr. 19, 2021).

22. *See* CAL. LAB. CODE § 925 (West 2021) (prohibiting employers from entering into choice of forum or choice of law agreements with California workers); S.B. 3163, 99th Gen. Assemb. (Ill. 2016) (codified at 820 ILL. COMP. STAT. 90 *et seq.* (2017)) (prohibiting employers from entering into noncompetes with low-wage workers); ME. STAT. tit. 26, §§ 599-A to 599-B (2019) (prohibiting noncompetes where the employee's wages are at or below 400% of the federal poverty level); S.B. 328, 2019 Leg., Reg. Sess. (Md. 2019) (codified at MD. CODE ANN., LAB. & EMPL. § 3-716 (West 2021)) (prohibiting noncompetes for employees earning $15 an hour or less, or $31,200 per year); MASS. GEN. LAWS ch. 149, § 24L (2021) (prohibiting noncompetes for non-exempt employees, interns, and employees 18 years old or younger, and limiting most noncompetes to one year in duration); NEV. REV. STAT. § 613.195 (2020) (requiring employers to offer valuable consideration for noncompetes); S.B. 197, 2019 Leg., Reg. Sess. (N.H. 2019) (codified at N.H. REV. STAT. § 275.70-a (2020)) (prohibiting noncompetes for employees who earn an hourly rate equal to or less than 200 percent of the federal minimum wage); H.B. 2992, 80th Leg. Assemb., Reg. Sess. (Or. 2019) (codified at OR. REV. STAT. § 653.295 (2020)) (limiting noncompetes by, *inter alia*, requiring employers to inform employees at least two weeks before starting work that a noncompete is required, the employee must made more than four times the median family income as calculated by the Census Bureau, and the duration of the noncompete agreement is limited to 18 months following termination of employment); 28 R.I. GEN. LAWS § 28-59-3 (2020) (similar to Massachusetts); S.B. 480, 2020 Leg., Reg. Sess. (Va. 2020) (codified at VA. CODE ANN. § 40.1-28.7:8 (2021)) (prohibiting noncompetes for certain low-wage employees); H.B. 1450, 66th Leg., Reg. Sess. (Wash. 2019) (codified at WASH. REV. CODE §§ 49.62.020–.030 (2021)) (prohibiting noncompetes against employees making equal to or less than $100,000 and independent contractors making equal to or less than $250,000 annually, and presuming

Despite their importance, existing empirical research regarding the scope, frequency, and impact of noncompete agreements and other post-employment restraints on competition remains fragmented and incomplete.[23] Moreover, many of the empirical studies conducted thus far have significant limitations based on the methodologies and data sources used, a focus on particular types of employees (for example, CEOs and doctors), and/or the timing of the study.[24] In particular, very few studies "examin[e] the terms of actual employment contracts" regarding noncompetes because "employment contracts are not generally publicly available."[25]

This Article aims to make a substantial, new contribution to the growing but inchoate body of empirical research regarding noncompetes and other post-employment restraints. Specifically, it uses a hitherto-untapped data source: breach of employment contract claims asserted as part of trade secret litigation in federal court under the Defend Trade Secrets Act.[26] Using this resource, the Author created an original dataset of over 500 noncompete agreements and other contractual limitations on post-employment competition. Each of these agreements were then hand coded for a variety of information, including the employee's job position, his or her salary, the duration and scope of the noncompete clause, and the relevant governing law.

Several interesting findings emerge from this dataset, including that half of post-employment restraints on competition in trade secret litigation involve claims against technical, engineering, customer service, or sales staff, rather than high-ranking corporate executives, and that over a quarter of noncompetes apply to employees who have a base salary of $100,000 per year or less. This study also found evidence supporting the existence of the so-called "California effect"; namely, that employment agreements covering California employees are substantially less likely to include a covenant not-to-compete. Instead,

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that any noncompete with a duration exceeding 18 months after termination of employment is unreasonable and unenforceable).

23. *See* Bishara et al., *supra* note 1, at 10 ("Despite the heated discussion of the pros and cons of restrictive covenants . . . there are few empirical studies examining these agreements to provide evidence and guidance for businesses, employees, or policymakers."); Norman D. Bishara & Evan Starr, *The Incomplete Noncompete Picture*, 20 LEWIS & CLARK L. REV. 497, 500 (2016) ("[T]he existing legal and empirical research on the prevalence and impacts of noncompetes in the U.S. labor market remains piecemeal and unsatisfactory."); J.J. Prescott, Norman D. Bishara & Evan Starr, *Understanding Noncompetition Agreements: The 2014 Noncompete Survey Project*, 2016 MICH. ST. L. REV. 369, 372 ("[W]e know surprisingly little about the frequency, scope, and strength of noncompetition agreements across the country.").

24. *See* Bishara et al., *supra* note 1 (reporting the results of a sample of employment contracts for Chief Executive Officers of large, publicly-traded firms disclosed in federal securities filings); Kurt Lavetti, Carol Simon & William D. White, *The Impacts of Restricting Mobility of Skilled Service Workers: Evidence from Physicians*, 55 J. HUM. RES. 1025 (2020) (reporting results form a 2007 survey of physicians regarding noncompete clauses by state and employment status); Prescott et al., *supra* note 23 (using self-reported responses from an online survey); Peter J. Whitmore, *A Statistical Analysis of Noncompetition Clauses in Employment Contracts*, 15 J. CORP. L. 483 (1990) (studying a sample of appellate decisions on noncompete agreements from the 1960s and 1980s).

25. Bishara et al., *supra* note 1, at 10, 24.

26. Defend Trade Secrets Act of 2016, Pub. L. No. 114-153, 130 Stat. 376.

California firms appear to rely on non-solicitation agreements—which prohibit an employee from lobbying customers or recruiting employees or their former employer—as a substitute. Ultimately, the methodology used for this study can serve as a springboard for future research regarding not just noncompetes, but a variety of contractual provisions that may affect innovation policy, such as nondisclosure agreements and invention assignment clauses.

The remainder of this Article proceeds as follows. Part I provides an overview of the various types of contractual provisions that may limit an employees' ability to compete with their former employer. It then discusses the various theories regarding the role of covenants not-to-compete in innovation policy and the development of human capital. Next, it summarizes the existing empirical research regarding noncompetes, including the limitations of prior research. Part II describes the research objectives, study design, and data collection process for this empirical research project. It also notes several potential methodological limitations of this study. Part III explains the key findings from the dataset. Finally, Part IV discusses some implications of these results and potential directions for future research.

I. POST-EMPLOYMENT RESTRAINTS ON COMPETITON AND INNOVATION POLICY

A. AN OVERVIEW OF POST-EMPLOYMENT RESTRAINTS

Employers have used contract law to limit the ability of former employees to compete against them for hundreds of years.[27] While employed, a worker is bound by various legal doctrines that prevent against unfair competition with the employer, such as the duty of loyalty.[28] But once a job ends—regardless of the reason—these duties terminate, and "the departing employee is generally free to engage in any lawful competition."[29] As a result, "[t]he employee's valuable knowledge, skills, and relationships walk out the door when the employee leaves."[30]

27. *See* Blake, *supra* note 12, at 626 (noting covenants not to compete "comprise one of the traditional common-law 'restraints of trade' and present problems which have kept them before the courts for more than five hundred years"); *see also id.* at 629–37 (discussing English case and statutory law regarding post-employment covenants dating back to the 1400s).

28. *See* RESTATEMENT (THIRD) OF EMPLOYMENT LAW § 8.01(a) (AM. L. INST. 2015) ("Employees in a position of trust and confidence with their employer owe a fiduciary duty of loyalty to the employer in matters related to their employment."); *id.* § 8.01(b)(2) (providing that "competing with the employer while employed by the employer" is a breach of this duty); *see also* Michael Selmi, *The* Restatement*'s Supersized Duty of Loyalty Provision*, 16 EMP. RTS. & EMP. POL'Y J. 395, 400 (2012) ("Employees can . . . be seen as agents, and the duty of loyalty generally requires that employees not harm their employer.").

29. Bishara et al., *supra* note 1, at 11; *see also* RESTATEMENT (THIRD) OF EMPLOYMENT LAW § 8.05 ("A former employee may compete with, or work for, a competitor of the former employer . . . unless: (a) the former employee is bound by an agreement not to compete . . . or (b) . . . the former employee discloses, uses, or by words or conduct threatens to disclose or use, specifically identifiable trade secrets of the former employer . . . .").

30. Bishara et al., *supra* note 1, at 11.

Understandably, employers are reluctant to let such talent and knowledge voluntarily depart, potentially to the benefit of a competitor. One tool to prevent this is contractual restraints on post-employment competition, which can "temporarily maintain the status quo that existed prior to the employee's departure," thus effectively retaining the employer's "competitive advantage by contract," at least for a limited time.[31] Post-employment restraints also can prevent an employee from misappropriating trade secrets (and other confidential business information) by disclosing or using this information to the former employer's detriment.[32] But these same restraints also can interfere with individuals' personal autonomy and right to earn a living.[33] In addition, because noncompete agreements and other post-employment restraints are facially anticompetitive, they may negatively impact social welfare by reducing entrepreneurship, depressing employee wages and job satisfaction, and preventing the sharing of knowledge and ideas.[34]

There are several types of contractual post-employment restraints on competition.[35] The first, and perhaps best known, is a covenant not-to-compete (CNC).[36] CNCs prohibit an employee from joining a competitor or starting a

31. *Id.* at 12.

32. Blake, *supra* note 12, at 627 ("From the point of view of the employer, postemployment restraints are regarded as perhaps the only effective method of preventing unscrupulous competitors or employees from appropriating valuable trade information . . . for their own benefit.").

33. *See* LOBEL, *supra* note 16, at 37 ("From the perspective of labor advocates, every man and woman should have the right to earn a living and pursue their profession, and noncompetes . . . and other forms of human capital controls are heavy infringements upon the pursuit of that livelihood and therefore upon happiness."); Moffat, *supra* note 17, at 911–12 (exploring the impact of noncompetes on employees' "personal autonomy and dignitary interests").

34. *See* LOBEL, *supra* note 16; Robert W. Gomulkiewicz, *Leaky Covenants-Not-to-Compete as the Legal Infrastructure for Innovation*, 49 U.C. DAVIS L. REV. 251, 253–54 (2015) (noting that noncompetes "interfere with the flow of information that naturally results when employees change firms," which some scholars argue "play a critical role in spurring innovation"); Charles Tait Graves, *Analyzing the Non-Competition Covenant as a Category of Intellectual Property Regulation*, 3 HASTINGS SCI. & TECH. L.J. 69, 89 (2011) (contending that "the non-compete implicitly reflects a policy determination that" protecting employers from trade secret misappropriation "outweighs the potential social gains obtained through innovation, and the compensation and job satisfaction of individual employees who freely join or form competing businesses"); Moffat, *supra* note 17, at 917 ("Employees bound by non-competes tend to have less bargaining power and lower wages or salaries than those free of restriction."); Christina L. Wu, Comment, *Noncompete Agreements in California: Should California Courts Uphold Choice of Law Provisions Specifying Another State's Law?*, 51 UCLA L. REV. 593, 609 (2003) ("Competition among employers for employees leads to better wages and working conditions for employees, because employers feel obliged to give their employees good working environments and salaries to induce them to stay."). In their seminal treatise on the economics of intellectual property law, William Landes and Richard Posner admit that "[i]t is not even clear that enforcing employee covenants not to compete generates social benefits in excess of its social costs." WILLIAM M. LANDES & RICHARD A. POSNER, THE ECONOMIC STRUCTURE OF INTELLECTUAL PROPERTY LAW 371 (2003).

35. Bishara et al., *supra* note 1, at 12 ("There are several typical contract mechanisms employers use to restrict or penalize an employee's postemployment competition.").

36. "CNC" appears to be the most common abbreviation in the recent legal and economic literature on covenants not-to-compete. Some articles use "NCA" as an alternative abbreviation. *See, e.g.*, Sharon K. Sandeen & Elizabeth A. Rowe, *Debating Employee Non-Competes and Trade Secrets*, 33 SANTA CLARA HIGH TECH. L.J. 438, 440 (2017).

new firm that would compete with the former employer.[37] Many CNCs also prevent former employees from consulting or providing other assistance to a competitor that falls short of a formal employee/employer relationship.[38] In addition, CNCs usually preclude an employee from serving as a director or officer for, or taking a substantial ownership interest in, a competing firm.[39] CNCs are often expressly limited in time (duration) and geographic scope,[40] and some CNCs may also preclude the former employee from engaging in specific activities.[41]

In most states, CNCs are enforceable if they are reasonable.[42] Under this "rule of reason" approach, courts generally apply the test articulated in the *Restatement (Second) of Contracts*, which provides that:

> (1) A promise to refrain from competition that imposes a restraint that is ancillary to an otherwise valid transaction or relationship is unreasonably in restraint of trade if
>
> (a) the restraint is greater than is needed to protect the [employer]'s legitimate interest, or
>
> (b) the [employer]'s need is outweighed by the hardship to the [employee] and the likely injury to the public.[43]

As a result, CNCs are unreasonable if they are "more extensive in duration, geographical area, or type of activity than necessary to protect the employer's [legitimate] interest."[44] Legitimate interests may include protecting valuable and

37. Gomulkiewicz, *supra* note 34, at 260 ("A covenant-not-to-compete forbids a departing employee from competing with a former employer either as an employee of an established rival firm or by starting a new firm."); *see* Bishara & Starr, *supra* note 23, at 504 ("Covenants not to compete are a post-employment restrictive covenant between an employer and an employee that prohibits the employee from going to work for a competitor or otherwise competing with the former employer."); *see also Covenant Not to Compete*, BLACK'S LAW DICTIONARY (11th ed. 2019) ("A promise, usu. in a sale-of-business, partnership, or employment contract, not to engage in the same type of business for a stated time in the same market as the buyer, partner, or employer.").

38. *See* Bishara et al., *supra* note 1, at 37 (reporting that fifty-four percent of surveyed CEO contracts contain a CNC that "specifically prohibit entering a consulting agreement with a competitor").

39. *See Noncompete*, Executive Compensation (CCH) ¶ 415 (2018), 2018 WL 2269228 ("Most non-compete provisions contain fairly standard language that the employee or former employee cannot directly or indirectly own any interest in, operate, control or participate as a partner, director, principal, officer, or agent of . . . any company, person, or entity engaged in a competitive business. However, most non-competes also provide that: 'Notwithstanding anything herein to the contrary, this Section shall not prevent the Employee from acquiring securities representing up to [1% – 5%] of the outstanding voting securities of any publicly held corporation.'").

40. *See* Bishara et al., *supra* note 1, at 33 tbl.5, 36 tbl.7 (providing data on geographic and temporal limits on CNCs for CEO employment agreements).

41. *See* Whitmore, *supra* note 24, at 512–14 (discussing activity restraints in CNCs).

42. Gomulkiewicz, *supra* note 34, at 261. *See generally* BRIAN M. MALSBERGER, COVENANTS NOT TO COMPETE: A STATE-BY-STATE SURVEY (11th ed. 2017).

43. RESTATEMENT (SECOND) OF CONTRACTS § 188 (AM. L. INST. 1981).

44. Emily J. Kuo, *The Enforceability Gap of Covenants Not Compete in Telecommuting Employment Relationships*, 1996 U. CHI. LEGAL F. 565, 571 (1996); *see also* RESTATEMENT (SECOND) OF CONTRACTS § 188 cmt. d ("The extent of the restraint is a critical factor in determining its reasonableness. The extent may be limited in three ways: by type of activity, by geographical area, and by time."); RESTATEMENT OF EMPLOYMENT LAW § 8.06 (AM. L. INST. 2015) (providing that a CNC "is enforceable only if it is reasonably tailored in scope,

confidential business information, customer goodwill, and unique skills or training.[45] One of the most common rationales for CNCs is "the protection of intellectual property, especially trade secrets."[46] Because trade secret protection can be easily lost—for example, by accidental or intentional disclosure by a former employee—courts are often deferential to employer claims that CNCs should be enforced to protect trade secret information.[47]

In contrast, a minority of states, most notably California,[48] generally refuse to enforce CNCs under the public policy of favoring workers' freedom of mobility.[49] The relevant California statue, section 16600 of the Business and Professions Code, states: "Except as provided in this chapter, every contract by which anyone is restrained from engaging in a lawful profession, trade, or business of any kind is to that extent void."[50] As a result, the California Supreme Court has held that this law "prohibits employee noncompetition agreements unless the agreement falls within a statutory exception."[51] Several other states, including Illinois and Oregon, limit CNCs to particular categories of workers.[52]

Another type of restrictive covenant is a non-solicitation agreement (NSA).[53] NSAs prevent departing employees from soliciting business from their

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geography, and time to further a protectable interest of the employer," with certain narrowly delineated exceptions such as employer bad faith or material breach of contract).

45. RESTATEMENT (SECOND) OF CONTRACTS § 188 cmt. b; *see also* RESTATEMENT OF EMPLOYMENT LAW § 8.07 (listing "trade secrets . . . and other protectable confidential information that does not meet the definition of [a] trade secret," "customer relationships," "investment in the employee's reputation in the market," and the "purchase of a business owned by the employee" as legitimate interests for a CNC).

46. Gomulkiewicz, *supra* note 34, at 261; *see also* Outsorce Int'l, Inc. v. Barton, 192 F.3d 662, 670 (7th Cir. 1999) (Posner, J., dissenting) ("The clearest case for [CNCs] is where the employee's work gives him access to the employer's trade secrets."); Sandeen & Rowe, *supra* note 36, at 456 ("[T]he protection of trade secrets has long been considered a legitimate business interest that can justify a[] [CNC].").

47. *See* Sandeen & Rowe, *supra* note 36, at 447 (suggesting that courts are deferential to employers' assertions that CNCs are necessary to protect their alleged trade secrets, "even though the requirements for trade secret protection have become more exacting since adoption of the Uniform Trade Secrets Act").

48. Other states that generally refuse to enforce CNCs are North Dakota and Oklahoma. *See* N.D. CENT. CODE § 9-08-06 (2019); OKLA. STAT. tit. 15, § 219A (2021).

49. *See* Whyte v. Schlage Lock Co., 125 Cal. Rptr. 2d 277, 292 (Ct. App. 2002) ("Business and Professions Code section 16600 generally prohibits covenants not to compete, and California public policy strongly favors employee mobility."); *see also* Bishara et al., *supra* note 1, at 14–15; Gomulkiewicz, *supra* note 34, at 264. Some courts have recognized that California law may permit post-employment restraints on competition if it is "necessary to protect the employer's trade secrets." Metro Traffic Control, Inc. v. Shadow Frame Network, 27 Cal. Rptr. 2d 573, 577 (Ct. App. 1994) (citing Muggill v. Reuben H. Donnelly Corp., 398 P.2d 147, 149 (Cal. 1965)); *see also* Barnett & Sichleman, *supra* note 13, at 984 ("Section 16600 does not preclude an employer from preventing a departing employee via injunctive relief from joining a new employer by enforcing nondisclosure, nonsolicitation, or other similar postemployment obligations when doing so promotes the employer's interest in protecting its trade secrets.").

50. CAL. BUS. & PROF. CODE § 16600 (West 2021).

51. Edwards v. Arthur Andersen LLP, 189 P.3d 285, 288 (Cal. 2008).

52. *See* 820 ILL. COMP. STAT. 90/5 (2017) (prohibiting CNCs for employees who make less than $13 per hour or the minimum wage under applicable law); OR. REV. STAT. §§ 653.295, 653.020 (2020) (limiting CNCs to certain employees, including individuals who engage in salaried "professional work" and perform "predominantly intellectual, managerial, or creative tasks").

53. Bishara et al., *supra* note 1, at 7 (describing NSAs as a "subcategory of CNCs"). But NSAs are typically much narrower than CNCs in that they do not prevent most or all competition with the former employer—

former employer's clients and/or attempting to hire their employees for a specific period of time.[54] The latter type of NSA (prohibiting the solicitation of employees) is sometimes called a non-poaching or non-raiding clause.[55] Like CNCs, NSAs may be justified based upon the employer's legitimate interests in protecting its goodwill and confidential business or trade secret information, such as customer lists and preferences.[56] But because NSAs are more limited in scope than CNCs—they prohibit only certain types of post-employment conduct—some states that generally refuse to enforce CNCs may permit NSAs if they further an employer's legitimate interest and are reasonable in scope.[57]

Many employment agreements also contain non-disclosure agreements (NDAs) requiring that employees keep confidential trade secrets and other valuable business information that is not widely known.[58] NDAs that restrict the

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instead, they only prohibit certain types of conduct. In addition, some jurisdictions that largely prohibit CNCs are substantially more permissive of NSAs. *See infra* note 57 and sources cited therein.

54. *See* Bishara et al., *supra* note 1, at 12 (describing NSAs as "related to pursuing clients and recruiting other employees"); Erin E. Gould, Comment, *Read the Fine Print: A Critical Look at Oregon's Noncompete and Nonsolicitation Agreement Laws*, 88 OR. L. REV. 515, 519 (2009) ("[N]onsolicitation agreements . . . prohibit an employee from soliciting business from the employer's customer list, soliciting employment from the employer's current employees, or both.").

55. *See, e.g.*, PrecisionIR Inc. v. Clepper, 693 F. Supp. 2d 286, 289 (S.D.N.Y. 2010) (non-raiding); Greg T. Lembrich, Note, *Garden Leave: A Possible Solution to the Uncertain Enforceability of Restrictive Employment Covenants*, 102 COLUM. L. REV. 2291, 2295 n.16 (2002) (non-poaching).

56. *See* Jerrick Robbins, Comment, *A Solution to Utah's Non-Compete Dilemma: Soliciting the Use of Non-Solicitation Agreements*, 2017 BYU L. REV. 1227, 1254–56 (2017) (contending that NSAs "promote an employer's goodwill by preventing an employee from drawing away the customers and other employees that partially define this goodwill" and may help protect an employer's customer lists).

57. *See, e.g.*, OKLA. STAT. tit. 15, § 219B (2021) ("A contract or contractual provision which prohibits an employee or independent contractor of a person or business from soliciting, directly or indirectly, actively or inactively, the employees or independent contractors of that person or business to become employees or independent contractors of another person or business shall not be construed as a restraint from exercising a lawful profession, trade or business of any kind."); OR. REV. STAT. § 653.295 (2020) (prohibiting certain types of noncompetition agreements but not nonsolicitation agreements); Gould, *supra* note 54, at 517–18 ("[I]t appears that [section 653.295] applies only to noncompete agreements and does not apply at all to nonsolicitation agreements, leaving nonsolicitation agreements free from any statutory restrictions."); *see also* Michael Selmi, *Trending and the* Restatement of Employment Law*'s Provisions on Employee Mobility*, 100 CORNELL L. REV. 1369, 1381 (2015) (noting that NSAs "had traditionally been scrutinized lightly" compared to CNCs "because they were a lesser form of restraint").

The case law in California is muddled regarding the enforceability of NSAs. Some older lower court decisions indicated that California statutory law prohibiting contractual restraints on employment "does not invalidate an employee's agreement . . . not to solicit [the former employer's] customers." Loral Corp. v. Moyes, 219 Cal. Rptr. 836, 841 (Ct. App. 1985); *accord* Webb v. W. Side Dist. Hosp., 193 Cal. Rptr. 80, 84–85 (Ct. App. 1983) (upholding an arbitration decision enforcing a no-hire clause). But in 2008, the California Supreme Court struck down a one-year NSA that prohibited the defendant from soliciting his former employer's customers, holding that it was "invalid because it restrained [the employee's] ability to practice his profession." Edwards v. Arthur Andersen LLP, 189 P.3d 285, 292 (Cal. 2008). More recently, several federal and state court decisions in California have called *Loral* into question, holding that it is no longer good law in light of *Edwards*. *See, e.g.*, WeRide Corp. v. Huang, 379 F. Supp. 3d 834, 852 (N.D. Cal. 2019); Conversion Logic, Inc. v. Measured, Inc., No. 219CV05546ODWFFMX, 2019 WL 6828283, at *3–4 (N.D. Cal. Dec. 13, 2019); Barker v. Insight Global, LLC, No. 16-CV-07186-BLF, 2019 WL 176260, at *2–3 (N.D. Cal. Jan. 11, 2019); AMN Healthcare, Inc. v. Aya Healthcare Servs., Inc., 239 Cal. Rptr. 3d 577, 587–90 (Ct. App. 2018).

58. Bishara et al., *supra* note 1, at 3; *see also id.* at 42 (finding nearly all CEO employment agreements studied contained an NDA).

use and transfer of knowledge in a business context are potentially anticompetitive.[59] However, unlike CNCs, "a standalone NDA does not necessarily restrict an employee's mobility options" because "[t]he employee can still move to a competitor."[60] NDAs are widely used and permissible, even in states like California where CNCs are generally not enforced.[61]

B. THEORETICAL VIEWS REGARDING NONCOMPETES

Traditional economic theory views CNCs and other contractual post-employment restrictions on competition as important legal tools for the development of human capital.[62] Firms can increase their productivity—and thus their profitability—by investing in training of their workforce.[63] This may involve general training of transferrable skills, specific training that is most valuable to the current employer, or both.[64] Absent a CNC, however, "an incentive for opportunistic behavior is created" once a worker receives this training, "either by going to work for himself or by going to work for another firm, which will pay him a premium because of the value of his training."[65] As a result, "employers would underinvest in research, development, and employee training"—particularly "general training" that is readily transferrable to a new position—without post-employment restraints like CNCs.[66]

Second, under the traditional view, CNCs are justifiable as an effective method for firms to protect against the intentional or accidental disclosure of confidential business information, including trade secrets, to their competitors.[67] Even though employers can (and often do) contractually require their employees not to disclose trade secret information after termination through an NDA, this may prove insufficient, as a former employee may be unable to ignore the

59. *Id.* at 7.

60. *Id.* at 20.

61. *Id.* at 21.

62. *See generally* Blake, *supra* note 12; Kitch, *supra* note 12; Rubin & Shedd, *supra* note 12; *see also* Mark A. Glick, Darren Bush & Jonathan Q. Hafen, *The Law and Economics of Post-Employment Covenants: A Unified Framework*, 11 GEO. MASON L. REV. 357 (2002).

63. *See* Samila & Sorensen, *supra* note 19, at 425 ("Companies can increase their productivity by training workers, developing new products and processes, and building relationships with customers and suppliers."); *see also* Eric Garton, *The Case for Investing More in People*, HARV. BUS. REV. (Sept. 4, 2017), https://hbr.org/2017/09/the-case-for-investing-more-in-people.

64. GARY S. BECKER, HUMAN CAPITAL: A THEORETICAL AND EMPIRICAL ANALYSIS WITH SPECIAL REFERENCE TO EDUCATION 11–18 (1964).

65. Rubin & Shedd, *supra* note 12, at 97; *see also* Blake, *supra* note 12, at 652 (explaining that absent post-employment restraints on competition, an employer "cannot be sure" that an employee it has trained "will stay on so that [its] investment will be rewarded, since contracts for personal services are not usually specifically enforced").

66. On Amir & Orly Lobel, *Driving Performance: A Growth Theory of Noncompete Law*, 16 STAN. TECH. L. REV. 833, 837 (2013); *see also* Blake, *supra* note 12, at 652 ("Unless some enforceable commitment or effective deterrent is possible, employers will not be justified in making the optimum outlay on employee-training programs . . . .").

67. Blake, *supra* note 12, at 667–74; *see also* Moffat, *supra* note 1, at 900 ("It is often asserted that noncompetes are necessary for the protection of trade secrets . . . . Noncompete agreements regularly cite trade secrets or confidential information as the 'protectable interest' sought to be guarded with the contract.").

information learned in their previous job while working for a competitor.[68] Moreover, a *post hoc* breach of contract claim against a former employee for violating an NDA may be ineffective at undoing the harm caused.[69] Consequently, "[t]he most effective protective device" for trade secrets and other proprietary business information "is an enforceable covenant not to compete."[70]

More recently, however, numerous legal and economics scholars have forcefully challenged the traditional view regarding the normative desirability of CNCs.[71] First, they contend that CNCs negatively impact the mobility of skilled labor, which adversely affects employee productivity and economic efficiency.[72] By definition, CNCs constrain employees' freedom to work, temporarily precluding them from taking another position in the same field as their former employer. This effectively sidelines highly educated and valuable workers, wasting their time, atrophying their skills, and potentially degrading their professional networks.[73] Even if it is unclear whether the CNC would apply, the *in terrorem* effect of a potential lawsuit may cause the former employee to refrain from seeking new employment during the CNC.[74] At the same time, an employee subject to a CNC may be less attractive on the job market, as the risk of litigation may deter a prospective new employer—

68. *See* Blake, *supra* note 12, at 669–70 ("Even in the best of good faith, a former technical or 'creative' employee working for a competitor . . . can hardly prevent his knowledge of his former employer's confidential methods or data from showing up in his work.").

69. *See id.* at 669 ("[T]he important thing to the employer is not having a cause of action in case of a breach of confidence, but preventing the violation from occurring. An injunction not to disclose can seldom undo or effectively prevent the doing of the real damage.").

70. *Id.* at 670.

71. *See generally* LOBEL, *supra* note 16; Amir & Lobel, *supra* note 66; Norman D. Bishara, *Covenants Not to Compete in a Knowledge Economy: Balancing Innovation from Employee Mobility Against Legal Protection for Human Capital Investment*, 27 BERKELEY J. EMP. & LAB. L. 287 (2006); Mark J. Garmaise, *Ties That Truly Bind: Noncompetition Agreements, Executive Compensation, and Firm Investment*, 27 J.L. ECON. & ORG. 376 (2009); Gilson, *supra* note 15; Marx, *The Michigan Non-Compete Experiment*, *supra* note 19; Moffat, *supra* note 1; Moffat, *supra* note 17; Samila & Sorensen, *supra* note 19. *But see* Barnett & Sichelman, *supra* note 13, at 975–78 (responding to some of these arguments); Jonathan M. Barnett & Ted Sichelman, *Revisiting Labor Mobility in Innovation Markets* 12–29 (USC Gould Sch. of L. Ctr. for L. & Soc. Sci., Research Paper Series No. CLASS16-13, 2016), https://perma.cc/V2T9-6UGC (critiquing some of the most widely-cited empirical studies that contend noncompetes reduce labor mobility).

72. *See* Blake, *supra* note 12, at 650 ("Anything that impedes an employee's freedom of access to a job in which [the employee's] productivity . . . would be higher, involves a cost in terms of the economy's welfare.").

73. *See* Garmaise, *supra* note 71; Charles Tait Graves & James A. DiBoise, *Do Strict Trade Secret and Non-Competition Laws Obstruct Innovation?*, 1 ENTREPRENEURIAL BUS. L.J. 323, 331 (2006) ("An inventive employee . . . . wants to start a new company . . . . But his employer included a boilerplate non-competition covenant in his employment contract, and he is sidelined for a year from any activity that his employer might deem competitive. He must instead pursue a business less suited to his talents, or in which he has less experience. Waiting for one year means a wasted period, and few, if any, employees have the means to do nothing for a year before launching a competitive business."); *see also* Marsh USA Inc. v. Cook, 354 S.W.3d 764, 780–81 (Tex. 2011) (Willett, J., concurring) ("Economic dynamism in the 21st century requires speed, knowledge, and innovation—imperatives that must inform judicial review of efforts to sideline skilled talent. Courts must critically examine noncompetes in light of our contemporary, knowledge-based economy that prizes ingenuity and intellectual talent.") (footnote omitted).

74. Moffat, *supra* note 1, at 888.

especially if the former employer is a deep-pocketed incumbent in the same industry.[75] Thus, by limiting mobility, CNCs can "reduce the average quality of matches between employees and employers," adversely impacting "the productivity of companies."[76] As a result, critics of CNCs argue they can harm both employees and their prospective new employers.

Second, CNCs may depress employees' wages. A noncompete "has an inevitable tendency to reduce an employee's . . . bargaining power during his employment," as the employee cannot freely switch positions,[77] thus diminishing the threat that the employee will depart for higher wages elsewhere.[78] Indeed, CNCs are often the product of a preexisting disparity in bargaining power. "[A]s a general matter, employers have vastly more power in the negotiation and performance of the employment relationship. This asymmetry heavily influences the existence and character of [CNCs]."[79] As Viva Moffat has noted, CNCs "are rarely negotiated and, indeed, are often entered into well after the employment relationship has begun," when the employee's bargaining power is low.[80] And as previously mentioned, the threat of CNCs may require employees to take "occupational detours" to avoid potential litigation, which can harm their lifetime earnings.[81]

Third, CNCs may impede entrepreneurship and adversely affect innovation. By limiting labor mobility, CNCs can hinder employees from leaving their former employers to launch a new firm. This may occur directly by preventing a startup from competing against its founders' previous employer(s), as well as indirectly by making it more difficult for a startup to hire an experienced workforce.[82] In addition, CNCs interfere with the flow of information that occurs when employees change firms.[83] Scholars who favor

75. *See* Matt Marx & Lee Fleming, *Non-Compete Agreements: Barriers to Entry . . . and Exit?*, 12 INNOVATION POL'Y & ECON. 39, 52 (2012) ("[N]on-competes may favor large firms over small ones because of the asymmetric costs of the legal system.").

76. Samila & Sorensen, *supra* note 19, at 428.

77. Blake, *supra* note 12, at 648.

78. *See* Russell Korobkin, *Bargaining Power as Threat of Impasse*, 87 MARQ. L. REV. 867, 869 (2004) (discussing the role of competing job offers in bargaining using negotiation theory).

79. Moffat, *supra* note 1, at 885 (footnote omitted).

80. *Id.* at 884. However, some states require additional consideration—such as a promotion or raise—to support a noncompete entered into during employment. *See, e.g.*, Socko v. Mid-Atl. Sys. of CPA, Inc., 126 A.3d 1266, 1274–75 (Pa. 2015); Charles T. Creench, Inc. v. Brown, 433 S.W.3d 345, 351–54 (Ky. 2014). *But see* Runzkeimer Int'l, Ltd. v. Friedlen, 862 N.W.2d 879, 890–92 (Wis. 2015) (holding that continued employment is sufficient consideration to support a noncompete entered into during employment).

81. *See* Matt Marx, Good Work if You Can Get It . . . Again: Non-Compete Agreements, "Occupational Detours," and Attainment (July 21, 2017) (unpublished manuscript), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1456748 (finding, based on field data from interviews and a survey, that individuals seek to avoid violating post-employment restraints by taking "occupational detours").

82. Samila & Sorensen, *supra* note 19, at 428.

83. Gomulkiewicz, *supra* note 34, at 253–54; *see also* Bishara, *supra* note 71, at 306 ("[K]nowledge transfer from departing employees to other firms is, by design, inhibited by covenant not to compete enforcement. Knowledge spillover is thus less likely to happen in that manner because when employees are mobile and move to other firms they take tacit information with them, but by definition noncompetes limit mobility." (footnote omitted)).

limiting CNCs contend that these "information spillovers" play an important role in stimulating innovation, particularly in high-technology industries.[84]

Fourth, some scholars have highlighted the negative impact of CNCs on workers' autonomy and dignitary interests. As Harlan Blake explained in his seminal 1960 article on noncompetes, "[e]very postemployment restraint, for whatever reason imposed, has inevitable effects which in some degree oppose commonly shared values. In view of our feeling that a man should not be able to barter away his personal freedom, even this small degree of servitude is distasteful."[85] Although these concerns are not prominent in the economic literature, some have argued that employees' autonomy and freedom should be more strongly considered in the normative debate regarding CNCs.[86]

C. Existing Empirical Research on Noncompetes

This Subpart summarizes the methodology and results from a number of empirical studies of CNCs and other post-employment restrictive covenants. It is not intended to provide a complete report of all empirical research in this field,[87] but instead to highlight the most relevant studies conducted to date, their key findings, and some of their limitations.[88]

84. LOBEL, *supra* note 16, at 39–40, 95–97; Amir & Lobel, *supra* note 66, at 856–61; Gilson, *supra* note 15, at 579, 603–08.

85. Blake, *supra* note 12, at 650.

86. *See* Moffat, *supra* note 17, at 911 ("While the discussion of the efficiency implications is quite robust in the literature, the personal autonomy and dignitary concerns are often treated in . . . parenthetical fashion.").

87. Most notably, it does not include empirical studies in the economic and business literature that focus on the impact of differential enforcement of CNCs between states on numerous issues, including entrepreneurship, employee mobility, firm performance, capital investment, and employee training and wages. For a more detailed summary of this scholarship, see *generally* Bishara & Starr, *supra* note 23, at 523–34.

88. For a comprehensive list of the existing empirical literature regarding CNCs through 2016, see *generally* Bishara & Starr, *supra* note 23 (identifying twenty-four empirical studies). Empirical studies that at least partially involve CNCs that postdate the Bishara & Starr article include: Daniel Aobdia, *Employee Mobility, Noncompete Agreements, Product-Market Competition, and Company Disclosure*, 23 REV. ACCOUNTING STUD. 296 (2018); Thor Berger & Carl Benedikt Frey, *Regional Technological Dynamism and Noncompete Clauses: Evidence from a Natural Experiment*, 57 J. REG'L SCI. 655 (2017); Sarath Sanga, *Incomplete Contracts: An Empirical Approach*, 34 J.L. ECON. & ORG. 650 (2018); David P. Twomey, *The Developing Law of Employee Non-Competition Agreements: Correcting Abuses; Making Adjustment to Enhance Economic Growth*, 50 BUS. L. REV. 87 (2017); Desheng Yin, Iftekhar Hasan, Nada Kobeissi & Haizhi Wang, *Enforceability of Noncompetition Agreements and Firm Innovation: Does State Regulation Matter?*, 19 INNOVATION: MGMT., POL'Y & PRAC. 270 (2017); Smriti Anand, Iftekhar Hasan, Priyanka Sharma & Haizhi Wang, *Enforceability of Non-Complete Agreements: When Does State Stifle Productivity?* (Bank of Fin. Rsch., Discussion Paper No. 24/2017, 2017) https://ssrn.com/abstract=3022475; Jessica S. Jeffers, The Impact of Restricting Labor Mobility on Corporate Investment and Entrepreneurship (Dec. 2019) (unpublished manuscript), https://papers.ssrn.com/abstract_id=3040393; Omesh Kini, Ryan Wiliams & Sirui Yin, *CEO Noncompete Agreements, Job Risk, and Compensation*, REV. FIN. STUD. (forthcoming 2021); Michael Lipsitz, The Costs and Benefits of Noncompete Agreements (2017) (Ph.D. dissertation, Boston University), https://hdl.handle.net/2144/27309; Starr et al., *supra* note 2; Evan Starr, Justin Frake & Rajshree Agarwal, *Mobility Constraint Externalities*, 30 ORG. SCI. 961 (2019).

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1. Litigation Studies

Two early empirical studies relied on reported appellate court decisions regarding CNCs. In 1990, Peter J. Whitmore reviewed a sample of 105 court opinions from the years 1966–1968 and 1986–1988, representing past and then-present judicial enforcement of CNCs, respectively,[89] and then handed coded these cases for over thirty potential factors that may influence judicial decision-making.[90] Descriptively, Whitmore's study reported courts enforced CNCs slightly over half of the time in both decades,[91] but that the duration (time length) of enforceable CNCs decreased over time.[92] Specifically, Whitmore found that nearly all (94%) of CNCs contained some form of time restriction, but the average length of enforced CNCs was 21 months in the 1980s, compared to 27 months in the 1960s.[93] In addition, Whitmore found that nearly all (94%) CNCs contained some geographic and/or activity restraint,[94] but that the number of CNCs containing a geographic limitation decreased over time,[95] while the frequency of activity limitations had increased.[96] Whitmore also found that courts were much more likely to enforce CNCs over both time periods when the employee had access to and/or used confidential customers lists or trade secrets in his or her subsequent employment.[97]

A decade later, Helen LaVan randomly sampled 104 litigated cases in federal and state court involving noncompete agreements litigated in the 1980s and 1990s.[98] From this group of cases, LaVan found that CNCs involved managers 25% of the time, sales personnel 31% of the time, and other professionals 37% of the time.[99] Nearly a quarter (23.7%) of the sampled CNC cases involved trade secrets, with 14.2% also involving confidential business

89. Whitmore, *supra* note 24, at 494 n.67; *see also id.* app. A, at 528–32 (listing sampled cases).

90. *Id.* at 494–95; *see also id.* app. B, at 533 (listing variables).

91. *Id.* at 499 tbl.1 (reporting an overall enforcement rate of 58% for the 1960s cases and 55% for the 1980s).

92. *Id.* at 500–01.

93. *Id.* at 501. It is unclear why Whitmore's study reported mean (average) duration of CNCs rather than the median; the median is typically preferred as a descriptive statistic because it is more resistant to outliers.

94. *Id.*

95. *See id.* at 509 tbl.7 (reporting that 45% of CNCs in the decisions from the 1960s contained a geographic limitation compared to 26% of CNCs in the decisions from the 1980s). The study also found that the average mileage restriction in CNCs decreased between the 1960s and 1980s as well. *See id.* at 511 tbl.9 (finding that the average geographic restriction of CNCs was 70.6 miles in the decisions from the 1960s versus 45.0 miles in the decisions from the 1980s).

96. *See id.* at 509 tbl.7 (reporting that 39% of CNCs in the 1960s contained an activity limitation compared to 50% in the 1980s).

97. *Id.* at 503 tbl.2, 508 tbls.5 & 6.

98. Helen LaVan, *A Logit Model to Predict the Enforceability of Noncompete Agreements*, 12 EMP. RESP. & RTS. J. 219, 225 (2000). Although not entirely clear from the article, it appears that this random sample was drawn from a larger pool of 411 court opinions cited, discussed, or reported in Volumes 1–14 (1985 to 1998) of the Bureau of National Affairs (BNA) looseleaf publication *Individual Employee Rights Manual*. *See id.* at 219, 225, 234. Approximately 30% of these cases were in federal court (both district and appellate), and the remaining amount (70%) were in state court. *Id.* at 227 tbl.II.

99. *Id.* at 227 tbl.II. Another 1% were classified as CNCs involving entertainers. *Id.*

information.[100] This study also reported that in slightly over half of the cases (54.5%), courts found the CNC's geographic limitation to be reasonable, although it did not specify what these limitations were.[101] Similarly, LaVan reported that courts found activity restrictions in nearly two-thirds of the sampled CNCs (63.7%) to be reasonable, but the article did not describe the scope of these restrictions.[102]

2. *Studies of Specific Types of Employees*

A number of empirical studies have examined CNCs covering specific types of employees. Several of these have looked at employment agreements of high-ranking corporate executives of publicly-traded companies, whose contracts are publicly available in SEC filings.[103] In a 2006 article, Stewart Schwab and Randall Thomas examined a sample of 375 employment contracts for Chief Executive Officers (CEOs) at the 1500 largest public corporations, including whether these contracts included CNCs.[104] They found that about two-thirds (67.5%) of sampled CEO employment contracts contained CNCs, most of which were either for one (21.33%) or two (31.47%) years in length.[105]

In another study, Mark Garmaise looked at a random sample of SEC filings for 500 large, publicly traded firms from between 1992 and 2004, finding evidence that over 70% of these firms had CNCs with their top executives.[106] Somewhat surprisingly, this study also found that a majority (58%) of California firms in the sample reported using CNCs,[107] even though these agreements are usually unenforceable under California law.[108] Garmaise also developed a 12-factor scale to assess the strength of state enforcement of noncompetes (the "non-competition enforcement index").[109] Based on this scale, Garmaise found that increased state enforcement of CNCs "reduces executive mobility" and "results in lower executive compensation."[110]

In perhaps the most detailed study of actual employment agreements containing post-employment restraints to date, Norman Bishara, Kenneth Martin, and Randall Thomas analyzed CEO employment contracts for a random sample 500 S&P 1500 companies between 1996 and 2010.[111] They then hand

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100. *Id.*
101. *Id.*
102. *Id.*
103. *See* Bishara et al., *supra* note 1, at 3 ("[P]ublic companies must disclose their CEOs' employment contracts.").
104. Stewart J. Schwab & Randall S. Thomas, *An Empirical Analysis of CEO Employment Contracts: What Do Top Executives Bargain For?*, 63 WASH. & LEE L. REV. 231, 232–34 (2006).
105. *Id.* at 254–55, 255 tbl.9.
106. Garmaise, *supra* note 71, at 388, 396.
107. *Id.* at 396.
108. *See supra* notes 48–51 and accompanying text.
109. Garmaise, *supra* note 71, app. A.6. Barnett and Sichelman have critiqued Garmaise's non-competition enforcement index as problematic for several reasons. *See* Barnett & Sichelman, *supra* note 13, at 1010–17.
110. Garmaise, *supra* note 71, at 376–79.
111. Bishara et al., *supra* note 1, at 3.

coded each CEO employment agreement (874 in total) for a wide variety of information, including the frequency, scope, and duration of CNCs, NSAs, and NDAs in these contracts.[112] Bishara et al. report that over 70% of CEO contracts in their sample contained post-employment CNCs,[113] but that CNCs were less frequently used if the firm's primary location was in California.[114] Examining CNCs in more detail, they found that a majority of CEOs' CNCs lasted two years or less after their employment ended,[115] and that the geographic scope of these CNCs was quite broad—they most commonly applied either anywhere the employer operated or did business (38.3%) or had no express geographic limit (41.8%).[116] In addition, three-quarters (75.6%) of these agreements contained NSAs prohibiting CEOs from soliciting employees of their former firm, and a slight majority (50.8%) prohibited CEOs from soliciting customers of their former firm.[117] Finally, the vast majority of CEO contracts (87.1%) contained an NDA, and nearly all contracts that had a CNC also had an NDA (93.4%).[118]

Two other studies dealt with surveys of other groups of high-skill groups of workers. In conjunction with the Institute of Electrical and Electronics Engineers (IEEE), Matt Marx surveyed over 1000 engineers across a variety of industries.[119] Almost half of respondents (46.8%) indicated that they had been asked by an employer to sign a CNC; of these, nearly all (92.6%) agreed to do so.[120] In addition, Marx reported that over three-quarters (77.14%) of engineers who signed a CNC did so on or before their first day of employment with the firm.[121]

In a recent paper, Kurt Lavetti, Carol Simon, and William D. White surveyed nearly 2000 primary care physicians in five states.[122] They found that nearly half (45%) of primary care physicians in group practices are bound by CNCs.[123] The percentage of physicians covered by state varied significantly,

112. *See id.* at 24–27 (describing the study's methodology).

113. *Id.* at 29 tbl.3.

114. *See id.* at 34 tbl.6 (finding that CNCs were found in 84% of CEO contracts where the firm's primary location was outside of California, compared to 62.4% where the firm's primary location was inside California, and that this difference is statistically significant).

115. *See id.* at 36–37, 36 tbl.7 (reporting that 32.8% of CEOs had a CNC of one year or less, and another 31.8% had a CNC greater than one year but no more than two years; 7% were for greater than two years; and the remaining 28.5% did not specify a length or had another triggering event for the CNC's termination).

116. *See id.* at 41 tbl.9 (reporting also that another 5.3% of CNCs expressly applied worldwide, while 10.2% covered only the entire United States and another 4.3% covered only part of the United States).

117. *Id.* at 38.

118. *Id.* at 42.

119. Matt Marx, *The Firm Strikes Back: Non-Compete Agreements and the Mobility of Technical Professionals*, 76 AM. SOCIO. REV. 695, 701–02 (2011). The survey was sent to 5000 randomly-selected IEEE members, with a response rate of 20.6% (1029 surveys). *Id.* at 702.

120. *Id.* at 702 tbl.1.

121. *Id.* at 706 tbl.4.

122. Lavetti et al., *supra* note 24. The survey in question is the Physician Perspectives on Patient Care Survey, which the authors conducted in 2007. *Id.* at 1040. The states where primary care physicians were surveyed are: California, Georgia, Illinois, Pennsylvania, and Texas. *Id.*

123. *Id.* at 1030.

from a low of 31.3% in California to a high of 60.6% in Pennsylvania.[124] The former figure is interesting in light of the fact that CNCs are generally unenforceable in California.[125] In addition, primary care physicians who worked at group practices of more than a handful of doctors were more likely to be covered by CNCs.[126] Group practices that used CNCs were more likely to generate greater revenue per physician and spend more hours on patient care per week.[127] Finally, Lavetti et al. found that physicians covered by CNCs had longer tenures with a practice group, and thus were less likely to change positions, compared to those without CNCs.[128]

3. *Online Surveys*

A recent large-scale online survey of American workers provides additional information regarding the frequency and scope of CNCs and other post-employment restraints on competition. In a forthcoming article, Evan Starr, J.J. Prescott, and Norman Bishara report the results of a survey of labor force participants age 18 to 75 who reported working in the private sector (for profit or non-profit organizations) or were an employee of a public healthcare system.[129] After inviting over 700,000 participants, the authors conducted an extensive audit of completed survey responses to filter out potentially duplicative and unreliable surveys, resulting in a final sample of 11,505 respondents.[130] From these responses, they found an estimated 18% of workers were bound by a CNC.[131] Consistent with expectations, CNCs were more frequent among well-educated workers[132] and highly-compensated employees,[133] but approximately a third (35%) of respondents who lacked an undergraduate (bachelor's) degree reported being covered by a CNC at some point in the past, as well as a third (33%) of workers who made under $40,000 per year.[134] Similarly, CNCs were more common in certain highly-skilled

124. *Id.* at 1042 tbl.1.

125. *See supra* notes 48–51 and accompanying text.

126. Specifically, practices with 2–3 physicians used CNCs less than a third of the time (31.3%), while practices of 4–499 physicians used CNCs between 45–50% of the time. Lavetti et al., *supra* note 24, at 1056 tbl.8.

127. *See id.* at 1057 tbl.9.

128. *Id.* at 1058–61.

129. Starr et al., *supra* note 2, at 3.

130. *Id.* at 3–4; *see also* Prescott et al., *supra* note 23, at 406–55 (describing authors' methodology in detail).

131. Starr et al., *supra* note 2, at 5. Another recent survey of employers concluded that between 27.8% and 46.5% of private sector workers are subject to a noncompete. Alexander J.S. Colvin & Heidi Shierholz, *Noncompete Agreements: Ubiquitous, Harmful to Wages and to Competition, and Part of a Growing Trend of Employers Requiring Workers to Sign Away Their Rights*, ECON. POL'Y INST. (Dec. 10, 2019), https://www.epi.org/publication/noncompete-agreements.

132. *See* Starr et al., *supra* note 2, at 6, 22 fig.3 (reporting that 25% of surveyed persons with a bachelor's degree and 39% of persons with a professional degree were currently subject to a CNC, compared to under 15% for high school graduates and persons with less than two years of college).

133. *Id.* at 6, 22 fig.4 (reporting that at least 32% of surveyed persons making in excess of $100,000 per year were currently subject to a CNC, compared to 15% or less for those making less than $40,000).

134. *Id.* at 6.

occupations such as engineering, computer science, and management.[135] Persons who worked with trade secret information were significantly more likely to be bound by a CNCs.[136] In another paper based upon the same survey data, the authors find that CNCs are also associated with decreased labor mobility.[137]

In a recent policy paper, Alan Krueger and Eric Posner reported the results of an online survey of 795 employees.[138] Based on a weighted sample, they found that 15.5% of workers were currently covered by a CNC. They also found that higher-income workers were more likely to be subject to a CNC.[139] But in contrast to Starr et al., Krueger and Posner found that the percentage of workers bound by a CNC was slightly higher for those with a high school degree or less than for workers with at least some college education.[140]

4. *Experimental Studies*

A number of experimental studies have also attempted to assess the impact of CNCs on employee mobility and performance. Some of these studies involve interactions with voluntary participants in a controlled environment, while another cluster of articles has studied the impact of a single state's apparently accidental change regarding the enforceability of CNCs.

In one frequently-cited study, Matt Marx, Deborah Strumsky, and Lee Fleming exploited a "natural experiment"[141] involving Michigan's Antitrust Reform Act, which the authors asserted inadvertently repealed the state's statutory bar on enforcing noncompete agreements.[142] Using a difference-in-

135. *Id.* at 7, 23 fig.5.

136. *Id.* at 7, 25 fig.7.

137. *See* Evan Starr, J.J. Prescott & Norman Bishara, *The Behavioral Effects of (Unenforceable) Contracts*, J.L. ECON. & ORG. (forthcoming) (manuscript at 34–35), https://papers.ssrn.com/abstract_id=2858637.

138. ALAN B. KRUEGER & ERIC A. POSNER, HAMILTON PROJECT, A PROPOSAL FOR PROTECTING LOW-INCOME WORKERS FROM MONOPSONY AND COLLUSION 7–8 (2018), https://www.hamiltonproject.org/assets/files/protecting_low_income_workers_from_monopsony_collusion_krueger_posner_pp.pdf.

139. *Id.* at 8.

140. *See id.* (reporting that 17.5% of workers with a high school education or less were bound by CNCs, compared to 14.6% for those who had at least some college education).

141. A natural experiment in economics is a "serendipitous situation in which persons are assigned randomly to a treatment (or multiple treatments) and a control group, and outcomes are analysed for the purposes" of testing a hypothesis. J. DiNardo, *Natural Experiments and Quasi-Natural Experiments*, *in* 5 THE NEW PALGRAVE DICTIONARY OF ECONOMICS 9235, 9325–26 (3d ed. 2018). *See generally* THAD DUNNING, NATURAL EXPERIMENTS IN THE SOCIAL SCIENCES: A DESIGN-BASED APPROACH (2012) (providing an overview of the topic).

142. *See* Marx et al., *The Michigan Non-Compete Experiment*, *supra* note 19, at 877 (citing Act 274, Michigan Antitrust Reform Act of 1984 (codified at MICH. COMP. LAWS §§ 445.771–445.788 (2021))). The Michigan Antitrust Reform Act (MARA) was based on the Uniform State Antitrust Act promulgated by the National Conference of Commissioners of Uniform State Laws. *See* 2 ROCKY C. TSAI & KATHLEEN W. BRADISH, STATE ANTITRUST PRACTICE & STATUTES (5th ed. 2014). However, in enacting MARA, the Michigan legislature repealed MICH. COMP. LAWS § 445.761 (enacted in 1905), which provided that "[a]ll agreements and contracts by which any person . . . agrees not to engage in any avocation or employment . . . are hereby declared to be against public policy and illegal and void." Marx et al., *The Michigan Non-Compete Experiment*, *supra* note 19, at 877 (omissions in original). Based on the lack of contemporaneous commentary in the legislative history and law journal articles shortly after MARA's passage, Marx et al. conclude that MARA "inadvertently repealed" this statutory ban on enforcing CNCs. *Id.*

differences approach, they compared the job mobility of patented inventors in Michigan before and after this change with inventors in ten other states that did not enforce CNCs.[143] Marx et al. found that the intra-state job mobility of inventors in Michigan fell 8.1% once CNCs became enforceable,[144] with highly-skilled inventors in Michigan suffering an even greater decline of 16.2%.[145] In a follow-up study, Marx, Fleming, and Jasjit Singh found that the rate of interstate emigration of patented inventors in Michigan grew faster compared to other non-enforcing states in the decade following Michigan's legislative change,[146] leading the authors to conclude that CNCs "encourage the migration of [highly skilled] workers from states where such contracts are enforceable to states where they are not."[147]

However, Jonathan Barnett and Ted Sichelman have critiqued numerous aspects of the Marx et al. studies, including the incompleteness of the patent record for tracking inventor mobility, the selection of other (control) states as non-enforcing jurisdictions for CNCs, and the failure to control for the inclusion of a "savings clause" in Michigan's antitrust legislation which provided that pre-existing CNCs remained enforceable after its enactment.[148] Further muddying the waters is a recent paper that employed a similar difference-in-differences methodology involving Michigan and found that enforcement of CNCs "had a positive and significant effect on the startup job creation rate" and "little to no effect on the entry rate of new firms."[149]

Experimental studies also have reached mixed results regarding the impact of CNCs on employees' motivation and work performance. In a 2013 study, On Amir and Orly Lobel assessed the effects of postemployment restrictions on task performance by conducting an online experiment involving over 1000 subjects.[150] Participants were randomly assigned different types of work

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143. Marx et al., *The Michigan Non-Compete Experiment*, *supra* note 19, at 879–82. In particular, Marx et al. used matching algorithms for inventors in the National Bureau of Economic Research (NBER) patent file, which contained data on all U.S. patents issued from 1975 to 2000, supplemented by additional data collected by the authors. *Id.* at 879 (citing Bronwyn H. Hall, Adam B. Jaffe & Manuel Trajtenberg, *The NBER Patent Citations Data File: Lessons, Insights and Methodological Tools* (Nat'l Bureau of Econ. Rsch., Working Paper No. 8498, 2001)).

144. *Id.* at 884–86. This figure excluded Michigan inventors who worked for automobile firms. *Id.* at 887.

145. Marx et al. defined highly-skilled inventors as those that were one standard deviation above the mean in terms of patenting. *Id.* at 886.

146. *See* Marx et al., *Regional Disadvantage?*, *supra* note 19, at 397, 399 tbl.2 (finding that the rate of emigration of patented inventors in Michigan grew from 0.24% in 1975–1984 to 0.32% from 1985–1996, compared to patented inventors in the control group of states that did not enforce noncompetes, which decreased from 0.20% to 0.13% during these time periods).

147. *Id.* at 403.

148. *See* Barnett & Sichelman, *supra* note 13, at 1017–18, 1020–23; Barnett & Sichelman, *supra* note 71, at 73–83.

149. *See* Gerald Carlino, *Do Non-Compete Covenants Influence State Startup Activity? Evidence from the Michigan Experiment* (Fed. Rsrv. Bank of Phila., Working Paper No. 17-30, 2017), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3041843.

150. Amir & Lobel, *supra* note 66, at 837. These subjects were intended to simulate a high-skilled marketplace—99% had an undergraduate degree, while 43% also had a graduate degree. *Id.* at 852.

assignments requiring either pure effort or more creative production.[151] In addition, each participant was randomly assigned one of three conditions: an absolute noncompete that would preclude the subject from completing the same kind of task in future assignments; a partial noncompete where an employee could opt out of the restriction against similar work by paying back the training costs to the employer; and no contractual restriction.[152] The results from this experiment found that subjects with a CNC had a higher rate of failing to complete the assigned work.[153] In addition, participants with a CNC were twice as likely to make mistakes in the effort-based task.[154] Based on these results, Amir and Lobel contend that "certain postemployment contractual restrictions may negatively impact motivation and performance" and "discourage employees to invest in their work performance."[155]

In a 2016 article, Guido Buenstorf, Christoph Engel, Sven Fisher, and Werner Gueth reported the results of an experiment intended to simulate a principal-agent relationship subject to different noncompete restrictions.[156] Two of the conditions involved a CNC, while a third (baseline) condition lacked any restraint.[157] The study participants were 256 university students.[158] Contrary to the authors' hypotheses, the results of the experiment showed that "imposing a non-compete clause has no significant effect on effort."[159] From this, Buenstorf et al. concluded that "our experimental results do not suggest that adverse effects" on employee motivation from CNCs "are a substantial concern" in most cases.[160]

5. *Key Findings and Limitations of Prior Studies*

Several inferences may be drawn regarding the frequency, scope, and potential impact of CNCs from the existing body of empirical research. First, it appears that CNCs are widely used by employers, particularly for highly-skilled, highly-compensated employees. However, there is also evidence suggesting that a substantial number of lower-wage workers are subject to CNCs as well. Second, it appears that workers who deal with trade secret and other confidential business information are more likely to be covered by a CNC. Third, it appears

151. *Id.*

152. *Id.*

153. *See id.* at 854 (finding a 24% increase in dropout rates of participants subject to a noncompete).

154. *Id.* at 855. In contrast, subjects had a similar performance level in terms of error rates for the more creative assignment. *Id.*

155. *Id.* at 863; *see also id.* at 866 ("The results of this experimental study suggest that, under certain conditions, postemployment restrictions will suppress motivation to perform as well as degrade performance itself.").

156. Guido Buenstorf, Christoph Engel, Sven Fischer & Werner Gueth, *Non-Compete Clauses, Employee Effort and Spin-Off Entrepreneurship: A Laboratory Experiment*, 45 RSCH. POL'Y 2113, 2114 (2016).

157. *Id.*

158. *Id.* at 2117.

159. *Id.*

160. *Id.* at 2121.

that many CNCs are limited in duration, often for two years or less. Fourth, some CNCs are also expressly limited by geographic scope and/or activity restrictions, but it is not clear how often or to what extent these limitations occur. Fifth, even though CNCs are less common among workers and firms in California—not surprising in light of that state's general non-enforcement policy regarding CNCs—they are not entirely absent. Finally, using a variety of methodologies, a number of the studies conclude that CNCs significantly inhibit employee mobility.

While valuable, these empirical studies all have limitations that suggest a degree of caution is warranted in assessing their findings and their potential value for policymakers.[161] First, many of these studies examine only a specific type of employer—such as large, publicly-traded firms—or a specific type of employee—usually highly educated and highly compensated workers, like CEOs and doctors—that limits the ability to extrapolate their findings to the more diverse American business and labor markets.[162]

Second, only a handful of these studies involve the review of actual employment contracts (or other legally-binding documents, such as retention or bonus agreements) that may contain CNCs and other post-employment restrictions.[163] This is not surprising because employment contracts are generally not publicly available,[164] so most researchers have used other data sources, such as survey information, instead. But these alternative sources (which are essentially proxies) also have limits. For example, in the Starr et al. survey, nearly 30% of all respondents were unable to give a "yes" or "no" answer to the basic, threshold question of whether they had ever agreed to a CNC, with most of these (24.8%) indicating that they had never heard of CNCs.[165] As a result, the accuracy of self-reported information to the more detailed questions in this survey may also be in question. In addition, even though online surveys are now widely used in numerous academic disciplines due to their speed and relatively low cost, they may have their own biases and limitations compared to more traditional survey methods like telephone surveys or in-person interviews, including the representativeness of the responding population.[166]

161. *See* Barnett & Sichelman, *supra* note 13, at 964 (contending that "these [empirical] studies suffer from significant methodological limitations, deliver statistically weak results, and do not provide compelling support for the view that banning noncompetes promotes innovation").

162. *See* Barnett & Sichelman, *supra* note 71, at 5 ("Some studies focus on specific types of personnel, such as top executives, or types of firms, such as very large companies, that limit their applicability.").

163. *See* Bishara et al., *supra* note 1, at 24 ("Since employment contracts are not generally publicly available, researchers have been unable to examine [them] empirically.").

164. *See id.* at 3 ("[M]ost employment contracts are not publicly available, leaving researchers to speculate on the prevalence of these restrictions and their contents.").

165. Starr et al., *supra* note 2, at 5.

166. *See* Corina Cornesse & Michael Bosnjak, *Is There an Association Between Survey Characteristics and Representativeness? A Meta-Analysis*, 12 SURVEY RSCH. METHODS 1, 9 (2018) (finding web-based surveys to be less representative than other single-mode survey methods); *see also* Dan Kahan, *What's a "Valid" Sample? Problems with Mechanical Turk Study Samples, Part 1*, CULTURAL COGNITION PROJECT (July 8, 2013, 9:34 AM), http://www.culturalcognition.net/blog/2013/7/8/whats-a-valid-sample-problems-with-mechanical-turk-

Third, empirical studies of CNCs based on court decisions are subject to the well-known selection effect. "[T]he selection effect refers to the proposition that the selection of tried cases is not a random sample of the mass of underlying cases" because "[c]ases only go to trial when the parties substantially disagree on the predicted outcome."[167] Thus, "the disputes selected for litigation . . . will constitute neither a random nor a representative sample."[168]

Fourth, the underlying sources of information in several of the studies—particularly those relying on litigated cases—are now dated and thus may not be representative of current law and practice regarding CNCs. In particular, the Whitmore study relies in part on court opinions that are now fifty years old,[169] and the LaVan study uses cases dating back over thirty years as well.[170] But even some of the more recent studies that use survey evidence may be less-than-timely. For instance, Lavetti et al. rely on a 2007 survey of primary care physicians,[171] but much has changed in both the practice and business of medicine since then, most notably the enactment, implementation, and attempts to repeal the Affordable Care Act.[172]

Fifth, nearly all of these existing empirical studies focus primarily or exclusively on CNCs, ignoring other potential contractual limits on post-employment competition, such as NSAs that preclude the recruitment of an employer's clients or employees and NDAs that prohibit the disclosure of trade secret and other confidential information after termination of employment.[173] As a result, these studies only paint at best a partial picture regarding employers' use of contract law to limit post-employment competition from their former employees.

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study-sam.html (criticizing the validity of surveys using Amazon Mechanical Turk for "the study of how cultural or ideological commitments" influence cognitive processes); Dan Kahan, *Fooled Twice, Shame on Who? Problems with Mechanical Turk Study Samples, Part 2*, CULTURAL COGNITION PROJECT (July 10, 2013, 9:30 AM), http://www.culturalcognition.net/blog/2013/7/10/fooled-twice-shame-on-who-problems-with-mechanical-turk-stud.html (elaborating further on the alleged invalidity of Mechanical Turk samples "for the study of culturally or ideologically" motivated reasoning due to selection bias, prior repeated exposure to study measures, and possible misrepresentation of nationality). *But see* Scott Clifford, Ryan M. Jewell & Philip D. Waggoner, *Are Samples Drawn from Mechanical Turk Valid for Research on Political Ideology?*, RSCH. & POL., Dec. 2015, at 1, 7 ("Our study . . . provides evidence for the validity of samples drawn from [Mechanical Turk] for psychological research on ideology.").

167. Kevin M. Clermont & Theodore Eisenberg, *Trial by Jury or Judge: Transcending Empiricism*, 77 CORNELL L. REV. 1124, 1129 (1992) (quoting Theodore Eisenberg, *Testing the Selection Effect: A New Theoretical Framework with Empirical Tests*, 19 J. LEGAL STUD. 337, 337 (1990)). The seminal article on the "selection effect" is George L. Priest & Benjamin Klein, *The Selection of Disputes for Litigation*, 13 J. LEGAL. STUD. 1 (1984).

168. Priest & Klein, *supra* note 167, at 4.

169. *See supra* notes 89–97 and accompanying text.

170. *See supra* notes 98–102 and accompanying text.

171. *See supra* notes 24, 122–128 and accompanying text.

172. *See generally* Neda Laiteerapong & Elbert S. Huang, *The Pace of Change in Medical Practice and Health Policy: Collision or Coexistence?*, 30 J. GEN. INTERNAL MED. 848 (2015) (describing the impact of the Affordable Care Act of 2010 on primary care physicians and their practices).

173. Bishara et al. is a notable counterexample; this study contains substantial data on both NSAs and NDAs. *See* Bishara et al., *supra* note 1.

In sum, despite the valuable and important work done by legal, business, and economics scholars so far, there is room for additional empirical research on CNCs and other post-employment restraints on competition, especially those that use actual employment agreements from a broad cross-section of the American workforce as data sources.

II. METHODOLOGY

This Part first details the research objectives of this empirical project. It then explains the study design and data collection process. Finally, it describes some potential limitations of the methodology described herein.

A. RESEARCH QUESTIONS

Rather than starting with the articulation of formal hypotheses, this project began by recognizing that the existing empirical literature on CNCs lacked a large-scale study of actual employment contracts that covered more than just a single, narrow class of employees (like CEOs).[174] Relatedly, there has been relatively little recent empirical scholarship on what types of firms and workers use CNCs, as well as their scope.[175] Further, the literature is overwhelmingly focused on one type of post-employment restraint—CNCs—and has largely ignored other contractual limits on competition that employers may use, such as NSAs and NDAs.[176]

One as-yet-untapped source of employment contracts that could help shed light on these questions is federal trade secret litigation. Trade secret litigation was likely to be a fertile source of CNCs because employers may assert both CNCs and trade secrecy claims to protect their important business information.[177] Indeed, in a previous study of trade secret litigation in federal court under the recently-enacted Defend Trade Secrets Act (DTSA), the Author helped code whether complaints in these cases included or referred to a noncompete agreement.[178]

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174. *See* Bishara & Starr, *supra* note 23, at 534 ("The literature review makes clear that studies with the actual use of noncompetes are limited . . . ."); *see also* LEE EPSTEIN & ANDREW D. MARTIN, AN INTRODUCTION TO EMPIRICAL LEGAL RESEARCH 28 (2014) (noting that one "characteristic of a good research question is that it seeks to engage the existing literature," including "spott[ing] a gap" in existing studies).

175. *See* Bishara & Starr, *supra* note 23, at 535–36 ("[A]t the most basic level . . . what is missing from the literature is an understanding of what types of firms use noncompetes, what types of workers sign noncompetes, what the conditions of the noncompete are, and why and when such noncompetes are used.").

176. *See id.* at 536 ("[F]or states considering whether they should make the use of noncompetes illegal, it is important to know if firms . . . simply substitute other protection methods . . . .").

177. *See, e.g.*, Norman D. Bishara & David Orozco, *Using the Resource-Based Theory to Determine Covenant Not to Compete Legitimacy*, 87 IND. L.J. 979, 997–98 (2012) (noting a CNC claim may "be used in conjunction with other theories of knowledge ownership" such as "related trade secret . . . litigation against a former employee-owner").

178. David S. Levine & Christopher B. Seaman, *The DTSA at One: An Empirical Study of the First Year of Litigation Under the Defend Trade Secrets Act*, 53 WAKE FOREST L. REV. 105, 133, 153 & n.290 (2018).

In addition, after a preliminary review of the literature and data, one hypothesis that emerged was the "so-called 'California effect.'"[179] Specifically, scholars have assumed CNCs would be much less common in employment contracts for employees and firms located in California because CNCs are generally not enforceable there.[180] Prior empirical studies have found California residents are less likely to be covered by a CNC, but a substantial number of Californians nonetheless report having signed one.[181]

B. Study Design and Data Collection

An original dataset was created for this study.[182] The starting point for data collection was the Author's prior dataset of federal district court cases that involved a trade secret misappropriation claim in the one-year period following the DTSA's enactment in May 2016 ("DTSA Dataset").[183] As part of that study,[184] each case in the DTSA Dataset was hand coded for a variety of basic case information,[185] including the identity of the litigating parties,[186] the date when the first pleading asserting a DTSA claim was filed,[187] the district court where the case was filed,[188] the case's docket number,[189] and the assigned judge.[190] To supplement this previously-collected data, the Author also searched the Lex Machina database for DTSA cases filed on or before May 11, 2017 (the one-year anniversary of the DTSA's enactment).[191] A total of 689 DTSA cases were identified through these methods.

179. Bishara et al., *supra* note 1, at 15.

180. *See id.* at 48 (noting that employment contracts for firms located in California "are much less likely to include noncompete clauses, as California state courts will not enforce the provisions").

181. *See supra* notes 107, 124 and accompanying text.

182. In accordance with scholarly norms regarding empirical legal research, this dataset is being made publicly available upon the Article's publication. *See* Robin Feldman, Mark A. Lemley, Jonathan S. Masur & Arti K. Rai, *Open Letter on Ethical Norms in Intellectual Property Scholarship*, 29 HARV. J.L. & TECH. 339, 348 (2016) (recommending that "data needed to replicate the results in a published empirical paper should be made accessible to other academics at the time the paper is published"). It will be available at the following website: http://christopherbseaman.com.

183. Levine & Seaman, *supra* note 178, at 124–25. We used a variety of sources to identify these cases, including full-text searches of court dockets in Bloomberg Law and searches of district court opinions in WestlawNext and Lexis Advance. *Id.* The full list of DTSA cases identified from these sources is available at http://www.dtsalitigation.com.

184. For more detail regarding coding of the DTSA Dataset, see *id.* at 125–33.

185. Variable names are listed in brackets in the following footnotes.

186. These were coded as two separate string (text) variables: [plaintiff] and [defendant]. If multiple plaintiffs or defendants were named, only the first named party was used for each variable. Levine & Seaman, *supra* note 178, at 125 nn.104–05.

187. This variable [date] was coded in the following format: MM/DD/YYYY. *Id.* at 125 n.106.

188. This variable [court] was coded using a three- or four-letter abbreviation consistent with the federal Public Access to Court Electronic Records system ("PACER"). *Id.* at 126 n.107.

189. This variable [docket] was coded in the following format: N:NN-CV-NNNNN (N is a number). *Id.* at 126 n.108.

190. This was coded as a string variable: [judge]. *Id.* at 126 n.109.

191. LEX MACHINA, https://law.lexmachina.com (last visited Apr. 19, 2021).

In the initial phase of coding for this project, the pleadings in each DTSA case were reviewed to determine if they mentioned or referred to a CNC or NSA that applied to a current or former employee. The number of employees in each case who were allegedly covered by these post-employment restraints was also identified.[192] In total, 335 out of 689 cases (49%) included a reference to a CNC or NSA, covering a total of 532 employees.

Next, the online court docket was reviewed for these cases to locate the employment agreement or other document (such as a retention or bonus agreement) that contained the post-employment restraint(s).[193] For most employees, the full employment agreement containing the CNC and/or NSA was available in the online court docket, often as an exhibit or attachment to the complaint itself.[194] For employees where the agreement could not be located, information alleged in the complaint (or other relevant pleading) was used instead.[195]

Each agreement was then hand coded for a variety of information.[196] First, it was coded for whether it contained a CNC, which was defined as a prohibition on working for or being employed by a competing firm, or otherwise engaging in competition against the former employer, after termination of employment.[197] The length (duration) of the CNC[198] and the geographic limit of the CNC, if any, was also coded.[199]

Second, each agreement was coded for whether it included an NSA, which was defined as a prohibition on soliciting the former employer's customers and/or employees.[200] Many employment agreements with a CNC also contained an NSA, even though the language of the CNC in many cases would also preclude conduct prohibited by the NSA.[201] Each agreement was also coded more granularly for whether the NSA prohibited soliciting customers or clients of the former employer,[202] whether the NSA prohibiting soliciting other

192. This was coded as a numeric variable: [empno]. In the final dataset, a separate entry was created for each employee subject to a noncompete.

193. We used Bloomberg Law's dockets feature to conduct this review. "We" in this context refers to the Author and his research assistants.

194. For 446 out of 532 employees (84%), the entire agreement was available. A hyperlink to each of these documents is contained in the following variable in the dataset: [noncomplete_link]. The agreement was only partially available for another 17 employees (3%), usually due to redaction of parts of the agreement.

195. This occurred for 69 out of the 532 employees (13%).

196. For more detail regarding the hand coding process, see *infra* notes 219–221 and accompanying text.

197. This was coded as a binary (dummy) variable: [cnc].

198. This was coded as a numeric variable for the CNC's duration in months after termination of employment: [cnc_time]. For example, a one-year CNC would be coded as 12.

199. This was coded as a categorical variable: [cnc_distance].

200. This was coded as a binary variable: [nsa].

201. Specifically, of the 351 employees subject to a CNC, 301 (86%) were also subject to an NSA.

202. This was coded as a binary variable: [nsa_customers].

employees of the former employer (for example, a non-raiding clause),[203] or both.[204] Finally, the length (duration) of each NSA was coded.[205]

Third, some additional information from the employment agreement was coded. This included the year that the agreement was entered into;[206] the governing law specified in the agreement, if any;[207] and whether the agreement contained an arbitration clause.[208] The industry of the employer was also coded.[209]

Finally, information about the employee(s) covered by the CNC and/or NSA was coded. In particular, both the complaint and the employment agreement was reviewed to determine the employee's job title,[210] as well as the employee's base salary[211] and eligibility for other compensation such as sales commissions, bonuses, and equity/stock incentive agreements,[212] if available.

C. Limitations

Like virtually all empirical research, the methodology used in this study has limitations that could affect the results and implications discussed in the

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203. This was coded as a binary variable: [nsa_employees].

204. This was coded as a categorical variable, based upon information from the previous two variables: [nsa_detail].

205. This was coded as two separate variables for the NSA's duration in months after employment: [nsa_time_customers] for NSAs involving customers and [nsa_time_employees] for NSAs involving employees].

206. This was coded as a four-digit number: [doc_year]. If multiple employment agreements for a single employee contained a CNC and/or NSA, the most recent available agreement was used.

207. This was coded as a two-letter variable based on the U.S. Postal Service code for the relevant state: [law]. For example, "CA" was used if the agreement specified that California law would apply to any dispute. "XX" was used if no governing law was identified in the agreement or if information regarding the governing law was not available. "OT" was used if the agreement specified that foreign (non-U.S.) law applied.

208. This was coded as a binary variable: [arbitrate]. An employer may seek to enforce a CNC in arbitration if the employment agreement authorizes it to do so. *See, e.g.*, Cynthia L. Estlund, *Between Rights and Contract: Arbitration Agreements and Non-Compete Covenants as a Hybrid Form of Employment Law*, 155 U. PA. L. REV. 379, 381 (2006) (noting that arbitration agreements for CNCs are "increasingly common, frequently litigated, and controversial"); *see also* Nitro-Lift Techs., L.L.C. v. Howard, 568 U.S. 17, 21–22 (2012) (per curiam) (overturning a state court decision that declined to submit a noncompete dispute to arbitration despite the existence of an arbitration clause in the employment agreement).

209. This was coded as a numeric variable based upon the employer's North American Industry Classification System (NAICS) code: [industry]. The NAICS is the standard used by federal statistical agencies in classifying business establishments for the purposes of collecting, analyzing, and publishing statistical data regarding the U.S. economy. *See* OFF. OF MGMT. & BUDGET, EXEC. OFF. OF THE PRESIDENT, NORTH AMERICAN INDUSTRY CLASSIFICATION SYSTEM (2017), https://www.census.gov/eos/www/naics/2017NAICS/2017_NAICS_Manual.pdf.

210. This was coded as a categorical variable: [job]. The following categories were used: President or Chief Executive Officer; Other Senior Management (for example, Vice President); Technical/Engineering Staff; Sales/Customer Service Staff; Owner/Former Owner; Other; Unknown. In addition, the job title of the employee (if available) was coded as a string variable: [job_title].

211. This was coded as numeric variable: [salary]. For employees paid at an hourly rate, the annual salary was calculated by multiplying their hourly rate by forty hours per week, by fifty weeks per year.

212. This was coded as a binary variable: [othercomp].

remainder of this Article.[213] This Subpart discusses several potential limitations and the Author's efforts to address them.

First, this study is based upon information from litigation, which is subject to the well-known selection effect. As previously mentioned, the cases that end up in litigation "constitute neither a random nor a representative sample . . . of all disputes."[214] One reason for this bias is that litigation is expensive; "[m]any disputes are resolved before a lawsuit is filed" because it is often more cost effective "to settle than to litigate."[215] In particular, this dataset is based on trade secret litigation, which can be quite expensive, even compared to other types of civil litigation in federal court.[216] As a result, parties may select other methods, such as alternative dispute resolution, to resolve their grievances.[217] Furthermore, if the employment agreement provides for resolution of disputes through mandatory arbitration, these cases also typically will not be litigated and thus will not appear in the dataset.[218]

Second, the number of employment agreements in the dataset is relatively small given the estimated frequency of CNCs in the American workforce. In other words, it is difficult to draw any definitive conclusions regarding millions

213. *See* Michael Heise, *The Past, Present, and Future of Empirical Legal Scholarship: Judicial Decision Making and the New Empiricism*, 2002 U. ILL. L. REV. 819, 849 ("Data, research design, and statistical methods frequently enforce limits on what can be properly inferred from the results of empirical studies. . . . Notwithstanding these inherent and structural limitations, empirical methodologies are well-positioned to enhance and complement traditional legal scholarship."). Under best practices, authors of empirical legal research "should discuss limitations on the validity and generalizability of [their] empirical findings." Gregory Mitchell, Essay, *Empirical Legal Scholarship as Scientific Dialogue*, 83 N.C. L. REV. 167, 203 (2004).

214. Priest & Klein, *supra* note 167, at 4. It is worth noting that the Priest-Klein model is focused on empirical studies of outcomes (such as win rates) in litigation; as such, it defines the term "litigated" narrowly as only disputes where "a verdict is rendered." *Id.* at 4–6. This study, in contrast, starts with a larger group of DTSA cases involving a CNC or NSA and is not limited only to cases that reached a resolution on the merits.

215. Robert H. Gertner, *Asymmetric Information, Uncertainty, and Selection Bias in Litigation*, 1993 U. CHI. L. SCH. ROUNDTABLE 75, 75, 79; *see also* Theodore Eisenberg, *Litigation Models and Trial Outcomes in Civil Rights and Prisoner Cases*, 77 GEO. L.J. 1567, 1571 (1989) ("Both sides can save the costs of litigation by settling [a] dispute.").

216. *See* AM. INTELL. PROP. L. ASS'N, 2019 REPORT OF THE ECONOMIC SURVEY 68 (2019) (finding in a survey of IP attorneys that the median litigation cost for a trade secret case varied from $550,000 (if less than $1 million was at risk) to over $7.5 million (if more than $25 million was at risk)).

217. *See generally* Steven Shavell, *Alternative Dispute Resolution: An Economic Analysis*, 24 J. LEGAL STUD. 1 (1995) (examining reasons why parties would choose alternative dispute resolution as opposed to trial); Scott H. Blackman & Rebecca M. McNeill, *Alternative Dispute Resolution in Commercial Intellectual Property Disputes*, 47 AM. U. L. REV. 1709, 1728 (1998) (explaining that ADR is often preferred in trade secret litigation because "[b]y the very nature of the issues involved, usually at least one party . . . is very concerned about maintaining the secrecy of the trade secret or other confidential or proprietary information").

218. *See supra* note 208 and accompanying text. Even if an arbitration clause is included, however, some of these disputes may still end up in federal court for preliminary relief, such as a temporary restraining order or preliminary injunction. *See, e.g.*, Oldham Graphic Supply, Inc. v. Cornwell, No. 09-1250-WEB-KMH, 2009 WL 3003850 (D. Kan. Sept. 17, 2009) (preliminarily enjoining former employee from engaging in business activities in violation of noncompete agreement pending the completion of arbitration proceedings); St. Jude Med. S.C., Inc. v. Hasty, No. CIV 06-4547, 2007 WL 128856 (D. Minn. Jan. 12, 2007) (granting a preliminary injunction against a former employee from violating noncompete and non-solicitation provisions and referring the matter to arbitration).

of CNCs (and other post-employment restraints) across a wide variety of firms and workers based upon a study of slightly over 500 employment agreements.

Third, many variables in the dataset were hand coded, which is a potential source of error. For example, if the variables are ambiguous or include room for subjectivity, this could result in inconsistent application and may negatively impact reproducibility.[219] However, this concern can be mitigated by creating, pilot testing, and implementing written coding instructions that all coders[220] must follow, as was done in this project.[221] In addition, the Author personally reviewed all of the coding decisions to ensure accuracy.

Fourth, information for some of the variables was missing, either because the employment agreement was not available (and the complaint did not include sufficient information to code), or because certain information was not included in or redacted from the agreement. This was a particular issue, for example, for salary information, which was only available for 89 of the 532 employees (17%). This issue was addressed by indicating missing values in the dataset and reporting on this situation in the results below.

III. RESULTS

This Part summarizes the results from the collected data, primarily through descriptive statistics. It first provides a variety of information regarding the employees in the dataset who were subject to either a CNC, an NSA, or both, and their employers. It next summarizes data regarding CNCs in the employment agreements. Finally, it describes some information about NSAs in these agreements.

A. EMPLOYEES AND EMPLOYERS

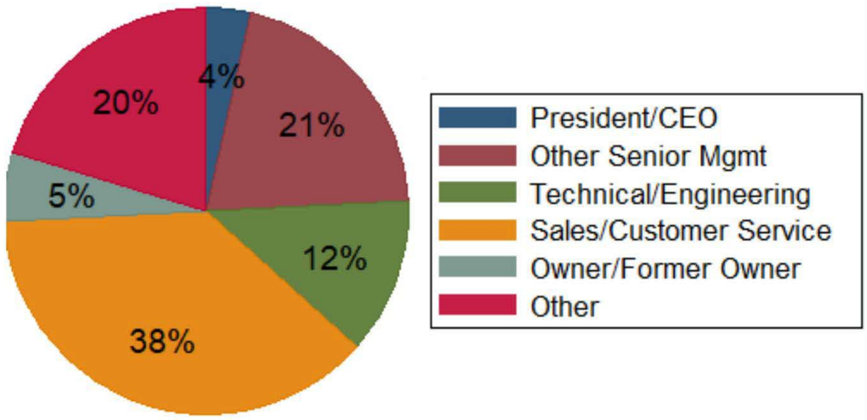
As previously described, the position (job type) and industry for each employee covered by a CNC and/or NSA was coded. Figure 1 below shows job types for these employees.

219. *See* EPSTEIN & MARTIN, *supra* note 174, at 95–105 (describing best practices for coding).

220. The coders for this project were law students who were employed as the Author's research assistants.

221. In empirical research, written coding instructions are preferred so that all coders apply the same criteria for each coding decision. This promotes consistency in coding and also serves as "a check against looking, consciously or not, for confirmation of predetermined positions." Mark A. Hall & Ronald F. Wright, *Systematic Content Analysis of Judicial Opinions*, 96 CALIF. L. REV. 63, 81 (2008); *see also* EPSTEIN & MARTIN, *supra* note 174, at 106–12 ("[T]he primary goal of a codebook is to minimize human judgment—to leave as little as possible to interpretation."). The written coding instructions for this project will be made available at: http://christopherbseaman.com.

FIGURE 1. EMPLOYEE JOB TYPES



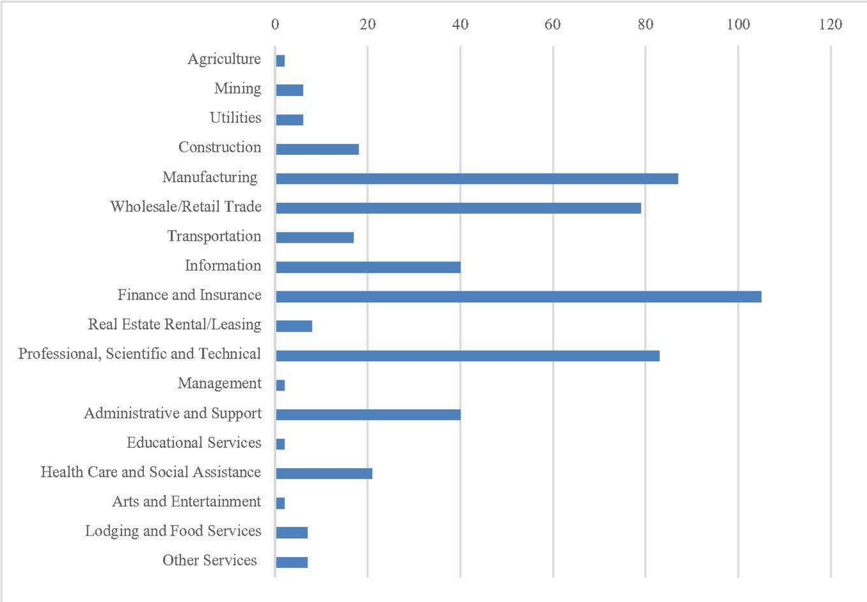
4% (19 employees) were the President or CEO, with another 21% (100 employees) as other senior management, such as a Vice President or Regional Manager. 12% (66 employees) worked in technical or engineering positions, while the largest group was sales and customer service staff at 38% (200 employees). 6% (29 employees) were current or former owners of a business,[222] while the remaining 20% (108 employees) had other job descriptions[223] or their jobs were unknown.

Figure 2 below shows the industry in which the employees worked, based on the employer named in the relevant agreement.

222. These cases often involved CNCs and/or NSAs signed as a part of the sale of the owner's business to the new employer.

223. For example, independent contractors who were subject to a CNC and/or NSA were classified in this category.

FIGURE 2. INDUSTRY OF EMPLOYER



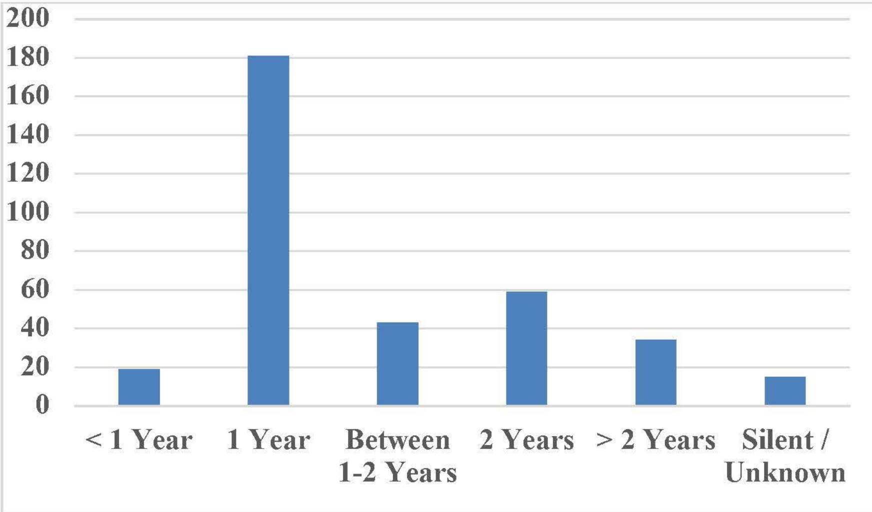
The most common industries represented in the dataset are: finance and insurance, 20% (105 employees); manufacturing, 17% (87 employees); professional, scientific, and technical services, 16% (83 employees); and wholesale and retail trade, 15% (79 employees). The next most common industries are: administrative and support services, 8% (40 employees); information services, 8% (40 employees); health care and social assistance, 4% (21 employees); construction, 3% (18 employees); and transportation, 3% (17 employees). The least common industries in the dataset are: real estate leasing and lending, 2% (8 employees); lodging and food services, 1% (7 employees); other services, 1% (7 employees); mining, 1% (6 employees); utilities, 1% (6 employees); agriculture, less than 1% (2 employees); education, less than 1% (2 employees); and management, less than 1% (2 employees).

B. COVENANTS NOT-TO-COMPETE

Of the 532 employees studied, 66% (351 employees) were covered by a post-employment CNC. This Subpart details the duration (length) and geographic scope of these CNCs, plus the salary information for employees covered by CNCs.

Figure 3 below reports the duration (length) of CNCs following termination of employment.

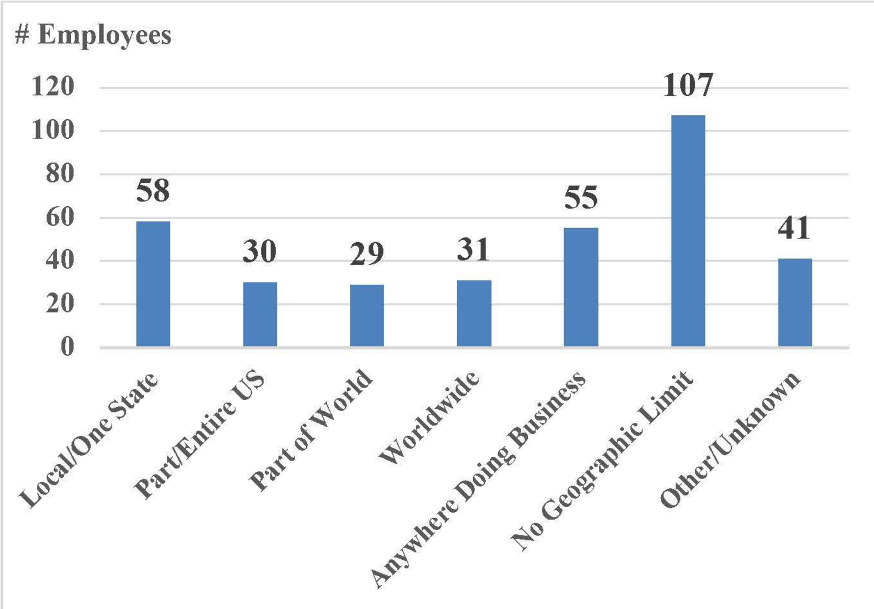
FIGURE 3. DURATION OF CNCS



The most common duration of a CNC is one year, for a slight majority of covered employees (52%, 181 employees), followed by two years as the next most common (17%, 59 employees). In total, 86% of CNCs were for two years or less. On the other end of the spectrum, 10% of CNCs (34 employees) were longer than two years, with 5% (16 employees) who were subject to CNCs of five years or more. In particular, owners or former owners of a business had a longer-than-normal CNC, with a mean duration of 32.5 months.

Figure 4 below reports the geographic scope of CNCs.

FIGURE 4. GEOGRAPHIC SCOPE OF CNCS



Almost 40% of all CNCs (138 employees) either did not have an express geographic limit or applied worldwide. 4% (14 employees) of CNCs applied to the entire United States, while an additional 8% of CNCs (29 employees) applied to the United States and at least one additional country (but less than the entire world). 5% (16 employees) of CNCs applied to only part of the United States (but greater than a single state), while 17% (58 employees) applied to one state or less (local). 16% (55 employees) of CNCs applied anywhere the employer did business. 5% (19 employees) of CNCs listed another geographic scope for the CNC (for instance, within a certain distance of anywhere the employee worked or serviced customers), and 6% (22 employees) of CNCs had an unknown geographic scope (for instance, if the employment agreement was not available).

The dataset also provided evidence to support the "California effect"—namely, that employees in California are less likely to be covered by a CNC.[224] Of the 532 employees in the dataset, 42 of them were subject to employment

224. One potential limitation on this finding is that employers—knowing that a noncompete covering a California-based employee is likely invalid—probably will not sue to try to enforce it. As a result, employment agreements with unenforceable noncompetes would be less likely to appear in our dataset. But even unenforceable noncompetes may have an *in terrorem* effect that can decrease labor mobility. *See* Blake, *supra* note 12, at 682 ("For every covenant that finds it way to court, there are thousands which exercise an *in terrorerm* effect on employees who respect their contractual obligations . . . ."); *see also* Rachel Arnow-Richman, *The New Enforcement Regime: Revisiting the Law of Employee Competition (and the Scholarship of Professor Charles Sullivan) with 2020 Vision*, 50 SETON HALL L. REV. 1223, 1252 (2020) (reviewing the relevant literature and concluding that "*in terrorem* effects of noncompete agreements are not hypothetical").

agreements governed by California law. Only two of these agreements (5%) contained a CNC.[225] In contrast, of the remaining 496 employees with agreements not governed by California law, 72% (349 employees) included a CNC. This difference is statistically significant.[226] Similarly, for trade secret litigation filed in a federal court in California, only 18% of cases (9 out of 49) involved an employment agreement with a CNC, compared to 71% (342 of 483) of employment agreements in cases filed outside of California. Again, this difference was statistically significant.[227]

Summary information regarding the annual base salaries (for instance, excluding bonuses, sales commissions, stock options, or other forms of financial incentives) of employees covered by CNCs is reported in Table 1 below.[228]

TABLE 1. ANNUAL BASE SALARY OF EMPLOYEES WITH CNC

Percentile	Salary
10%	$42,000
25%	$90,000
50% (Median)	$120,000
75%	$200,000
90%	$600,000

The median base salary of all employees covered by a CNC is $120,000, with the 25th percentile at $90,000 and the 75th percentile at $200,000. Notably, almost 30% of employees (19 of 65) subject to a CNC had an annual base salary of less than $100,000, with 14% (9 of 65) having a base salary of $50,000 or less. In sum, most employees covered by CNCs for whom base salary information was available fell within the top 20% of all Americans in terms of personal income, but CNCs also covered employees with base salaries as low as $20,000 per year.

In terms of income by job types, Presidents and CEOs subject to a CNC had the highest median base salary ($400,000), followed by other senior management ($185,000). Technical and engineering staff subject to a CNC had a median base salary of $82,500, and sales and customer service workers had a median base salary of $85,000.[229] Current and former owners subject to a CNC had a median base salary of $225,000. Employees with other job types subject to CNCs had a median base salary of $96,000.

225. In one of these cases, the presence or absence of a CNC could not be determined because the employment agreement was not available. *See* Complaint, Insight Global, LLC v. Beacon Hill Staffing Grp., LLC, 2018 WL 6573081 (N.D. Cal. Dec. 13, 2018) (No. 17-CV-00309).

226. The p-value for both Pearson's chi-square and Fisher's exact tests was < 0.001.

227. The p-value for both Pearson's chi-square and Fisher's exact tests was < 0.001.

228. Salary information was publicly available for 65 of 351 employees covered by a CNC. *See supra* Part II.C (noting this issue).

229. Notably, 14 of the 15 employees (93%) that fell into this category had an employment agreement that made them eligible for additional compensation, such as sales commissions and bonuses, meaning that these employees' total annual income was likely higher than their base salary.

C. NON-SOLICITATION AGREEMENTS

This study also examined evidence from employment agreements regarding the frequency and scope of NSAs. 90% of all employees (477 of 532) in the dataset were covered by an NSA. More detailed information regarding the frequency and type of these NSAs is listed in Table 2 below.

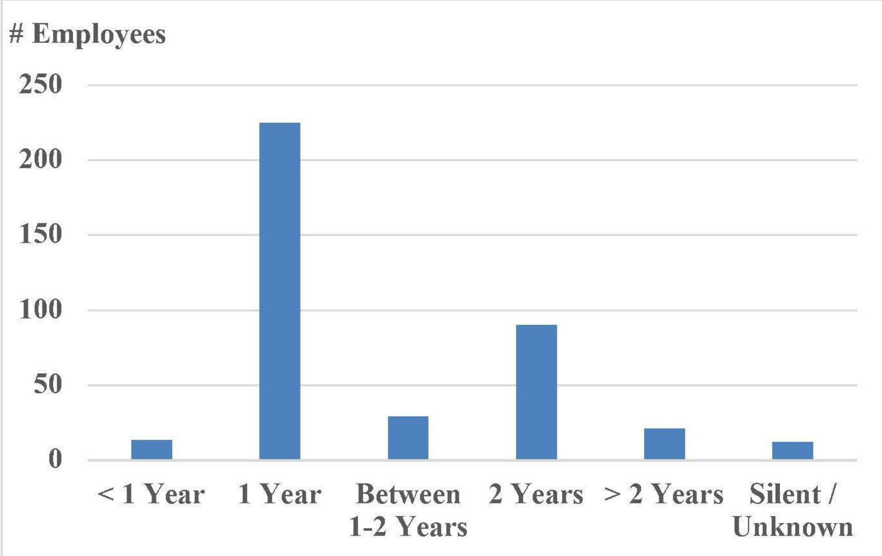
TABLE 2. FREQUENCY AND TYPE OF NSAS

Type	# Employees	% Employees
Customers Only	29	6%
Employees Only	86	16%
Both Customers and Employees	362	68%
No NSA	45	8%
Unknown	10	2%

In particular, 73% of employees (391 of 532) in the dataset were prohibited from soliciting customers of their former employer, and 84% of employees (448 of 532) were subject to an anti-raiding clause (non-solicitation of other employees). Not surprisingly, sales and customer service staff (84%, 162 of 192 employees) and current and former business owners (84%, 16 of 19 employees) were most likely to be prohibited from soliciting the customers of their former employer.

The duration of NSAs was similar to CNCs. Figure 5 below shows the time length of NSAs prohibiting solicitation of customers of the former employer.

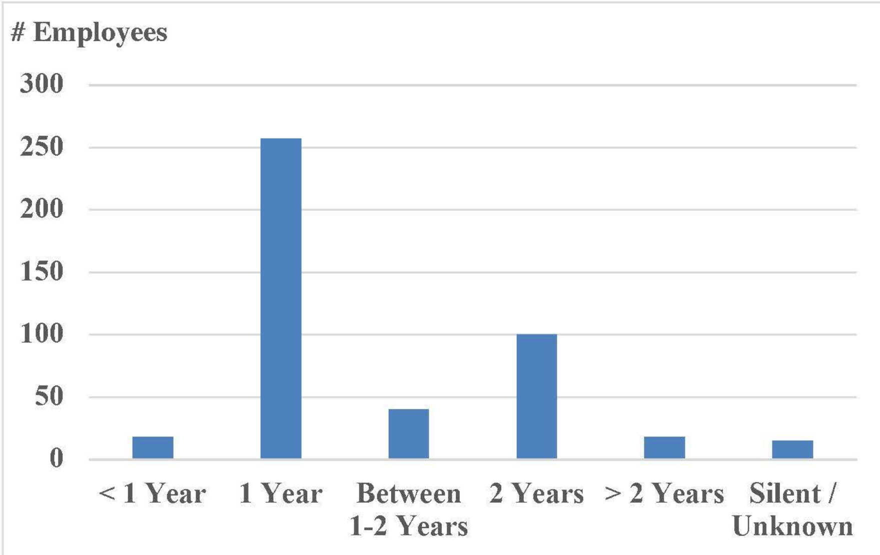
FIGURE 5. DURATION OF NSAS FOR CUSTOMERS



The most common length of an NSA prohibiting the solicitation of former customers was one year (58%, 225 of 391 employees), followed by two years (23%, 90 of 391 employees). Only 5% of employees (21 of 391) were subject to an NSA that lasted longer than 24 months. At the other end of the spectrum, only 3% of employees (13 of 391) had an NSA of less than a year.

Figure 6 below shows the duration of NSAs prohibiting the worker from soliciting other employees of the former employer (for instance, anti-raiding clause).

FIGURE 6. DURATION OF NSAS FOR OTHER EMPLOYEES



The distribution of the duration of NSAs prohibiting solicitation of other employees is very similar to that of NSAs prohibiting solicitation of former customers. The most common length of an NSA prohibiting the solicitation of other employees was one year (57%, 257 of 448 employees), followed by two years (22%, 100 of 448 employees). Only 4% of employees (18 of 448) were subject to an NSA that lasted longer than 24 months. At the other end of the spectrum, 4% of employees (18 of 448) had an NSA of less than a year.

Interestingly, the data also suggests that firms use NSAs as a partial substitute for CNCs for California-based employees. Of the 42 employment agreements that were governed by California law, all of them (100%) contained an NSA, compared to 90% of employees (440 of 490) with agreements governed by another jurisdiction's law. Similarly, nearly all cases (95%, 47 of 49 employees) filed in a federal court in California alleged a breach of an NSA.

Summary information regarding the annual base salaries (for example, excluding bonuses, sales commissions, stock options, or other forms of financial incentives) of employees covered by NSAs is reported in Table 3 below.[230]

230. Salary information was publicly available for 83 of 477 employees covered by a NSA. *See supra* Part II.C (noting this issue).

TABLE 3. ANNUAL BASE SALARY OF EMPLOYEES WITH NSA

Percentile	Salary
10%	$42,000
25%	$75,000
50% (Median)	$110,000
75%	$197,000
90%	$400,000

The median base salary of all employees covered by an NSA is $110,000, with the 25th percentile at $75,000 and the 75th percentile at almost $200,000. Almost 40% of employees (33 of 83) subject to an NSA had an annual base salary of less than $100,000, with 20% (17 of 83) having a base salary of $50,000 or less.

IV. IMPLICATIONS AND FUTURE RESEARCH

This Part first describes several implications from the results described above. It then discusses possible directions for future research regarding CNCs and other post-employment restraints on competition, as well as other contractual clauses that may impact innovation.

A. IMPLICATIONS

First, the results reinforce findings from previous empirical research that CNCs and other post-employment restraints on competition are frequently used by employers to cover workers in "high-skill, high paying jobs."[231] Nonetheless, the data also suggests that a substantial number of lower-wage workers are covered by CNCs and/or NSAs as well. Specifically, approximately 15% of employees covered by CNCs for whom salary information was available had an annual base salary below the median U.S. household income.[232] This is consistent with the large-scale survey conducted by Starr et al., which found that 13.3% of workers who earn less than $40,000 per year report being currently bound by a CNC.[233] In particular, it raises questions about whether CNCs that cover low-wage, lower-skill employees are being used to protect an employer's legitimate interests, or instead whether they are being improperly imposed "to

231. Starr et al., *supra* note 2, at 1.

232. *See* JESSICA SEMEGA, MELISSA KOLLAR, EMILY A. SHRIDER & JOHN F. CREAMER, U.S. CENSUS BUREAU, INCOME AND POVERTY IN THE UNITED STATES: 2019, at 4 fig.1 (2020), https://www.census.gov/content/dam/Census/library/publications/2020/demo/p60-270.pdf (showing a median household income of $68,703 for 2019). The annual base salary may understate employees' actual income, however, as it does not include any income from sales commissions, bonus, or stock incentives. *See supra* notes 222, 228 and accompanying text.

233. Starr et al., *supra* note 2, at 6. In total, 33.0% of employees who make less than $40,000 per year report being ever bound by a CNC. *Id.*

exercise economic control over certain classes of employees" by limiting their freedom of mobility.[234]

Second, the employment agreements studied suggest that the primary limitation on the scope of CNCs is duration, rather than geography. Indeed, nearly half of all CNCs studied were effectively worldwide in their geographic scope.[235] This was somewhat surprising, as the literature and case law on noncompetes indicates that geographic limits often are significant in determining whether a CNC is reasonable in scope.[236] However, the absence of a geographic limitation in many CNCs may better comport with our modern, information-based economy. For example, even a small business may have a national or global customer base via the Internet, so competition could literally occur anywhere in the world.[237] In addition, because CNCs are often used to protect against the disclosure of trade secret or confidential business information, a broad geographic scope may be appropriate, "because once an employee has divulged a trade secret in any location[,] the likelihood that it will become public knowledge available to immediate competitors is greatly increased."[238]

234. Narragansett Coated Paper Corp. v. Lapierre, No. C.A. PC 97-2842, 1998 WL 388400, at *2 (R.I. Super. Ct. June 25, 1998); *see also* Ecology Servs., Inc. v. Clym Env't Servs., LLC, 952 A.2d 999, 1004 (Md. Ct. Spec. App. 2008) (affirming trial court decision to decline enforcement of CNCs against "clearly low level employees" who were "not utilizing skills against whom covenants not to compete could be enforced"); BHB Inv. Holdings, L.L.C. v. Ogg, No. 330045, 2017 WL 723789, at *5 (Mich. Ct. App. Feb. 21, 2017) (refusing to enforce CNC for "a low-level employee with general knowledge and skills in swimming and swim instruction" because "[h]e had no valuable insider information that could be used for corporate espionage").

235. *See supra* Part III.B.

236. *See* DONALD J. ASPELUND & JOAN E. BECKNER, EMPLOYEE NONCOMPETITION LAW § 6:8 (2020 ed.) ("Although sometimes characterized as preliminary considerations, area limitations are important ones. Area limitations frequently appear in covenants not to compete.") (footnotes omitted); Blake, *supra* note 12, at 675 ("The traditional dimensions of a [CNC] have been those of duration and geographic area."); Whitmore, *supra* note 24, at 489 ("When determining the enforceability of a [CNC], the court will examine many different factors, the most prominent of which are thought to be the length of the time restraint and the breadth of the geographical restraint.") (footnote omitted); *see also* Arcor, Inc. v. Haas, 842 N.E.2d 265, 273 (Ill. App. Ct. 2005) (finding a CNC "unenforceable because it contained no geographic limitation" and thus was effectively a "blanket prohibition on competition").

237. *See, e.g.*, PrecisionIR Inc. v. Clepper, 693 F. Supp. 2d 286, 292–93 (S.D.N.Y. 2010) (finding that a CNC's geographic limitation prohibiting competition anywhere in the United States and Canada was reasonable because the employer "has clients and does business over the Internet"); Nat'l Bus. Servs., Inc. v. Wright, 2 F. Supp. 2d 701, 708 (E.D. Pa. 1998) (holding that a CNC that applied in any state where the employer conducted business was reasonable in geographic scope because "[t]ransactions involving the Internet, unlike traditional 'sales territory' cases, are not limited by state boundaries"); *see also* Friese v. Fadner Media Enters., LLC, No. FSTCV146021437, 2017 WL 1238436, at *6–7 (Conn. Super. Ct. Jan. 18, 2017) ("[T]he law has come to acknowledge the inapplicability of geographic bounds to companies that do business on a national or international basis. This trend is particularly applicable to a business operating on the [I]nternet.") (citations omitted).

238. Blake, *supra* note 12, at 679; *see also id.* at 675 ("Restraints mainly concerned with protecting confidential information are likely to be inadequate if they contain any geographic limitation . . . ."); Universal Engraving, Inc. v. Duarte, 519 F. Supp. 2d 1140, 1152–53 (D. Kan. 2007) (finding a CNC with a worldwide geographic scope to be reasonable because the employer's "confidential information can be utilized through using a computer to transport the information, thus giving the information an easy route to travel worldwide, even if [the covered employee] did not move to another country").

In comparison, current CNCs are, on balance, shorter in duration than those in previous empirical studies. Specifically, the most common length of a CNC in this study is one year, with the vast majority lasting two years or less.[239] In contrast, the average duration of an enforceable CNC in the 1960s was over two years.[240] In industries where innovation is rapid, such as biotechnology, CNCs that last more than a year may substantially impede innovation by effectively sidelining highly-skilled employees and interfering with their ability to keep up with ongoing change.[241] In addition, if the anticipated duration of a trade secret is short—for instance, if reverse engineering is common, or if other competitors can be expected to learn or independently discover the secret on their own—then CNCs of shorter duration may be appropriate.[242]

Third, the results in this study suggest that the "California effect"[243] is real—in other words, that firms with California employees are less likely to include CNCs in their employment agreements. However, it also suggests that that California employers are using NSAs as an alternative to CNCs in an attempt to impose some post-employment limits on competition.[244] This suggests that policymakers who are considering legislation limiting the enforceability of CNCs should also consider the potential anticompetitive impact of NSAs as well.

Fourth, the dataset contains examples of CNCs that appear to be facially invalid under current state law. For instance, even though noncompetes are generally unenforceable under California and Oklahoma law,[245] several employment agreements with a choice of law clause for these states contain CNCs.[246] Even though these covenants are unenforceable, they nonetheless may deter employees from changing jobs. As Cynthia Estlund has explained, "[e]ven a manifestly invalid non-compete may have *in terrorem* value against an employee without counsel."[247]

239. *See supra* Part III.B.

240. *See supra* note 93 and accompanying text.

241. *See* Graves & DiBoise, *supra* note 73, at 330 (contending that "[a] one-year non-competition covenant is a substantial limitation on a skilled employee looking to find the most productive and innovative position available").

242. *See* Blake, *supra* note 12, at 678 ("[W]hen the confidential information known by the employee will lose its business significance in a short period of time, that period sets the outside limit for the effective duration of the restraint . . . .").

243. *See* Bishara et al., *supra* note 1, at 15.

244. *See supra* note 57 (discussing the uncertain status of NSAs under California law).

245. *See supra* notes 48–51 and accompanying text.

246. *See, e.g.*, Employee Confidentiality Agreement Between AllCells, LLC and Jack Y. Zhai 3 (June 1, 2010), https://drive.google.com/file/d/1Bo-iFCmJcgJ4XzmKyMUnG2HgvSKQphJp (including a one-year noncompete clause and selecting California as governing law); Employment Agreement Between SOAProjects, Inc., and Jayaraman Swaminathan 4–5 (July 7, 2008), https://drive.google.com/open?id=1RRC_kJu-D2uk6305E8KuSeCeCpYf-2j2 (stating terms of employment, including a one-year noncompete law, and selecting California as governing law); Employment Agreement Between Innovative Healthcare Systems, Inc., and Larry C. Winstead §§ 6, 13 (Jan. 1, 2008), https://drive.google.com/file/d/19oJDD1GO23wzt0RRPey9vhK-Dmlxyvx0/view (containing a three-year noncompete clause and selecting Oklahoma as governing law).

247. Estlund, *supra* note 208, at 423; *accord* Catherine L. Fisk, Commentary, *Reflections on the New Psychological Contract and the Ownership of Human Capital*, 34 CONN. L. REV. 765, 782–83 (2002) (noting

Finally, the enactment of the DTSA has—perhaps inadvertently—opened the doors of federal courthouses across the country to hear claims that employees have breached post-employment restrictions on competition. As the Author found in a previous study, the majority of DTSA cases also involve breach of contract and/or employment law claims.[248] Although breach of an employment contract is ordinarily a state law cause of action, federal courts can exercise supplemental jurisdiction over these claims when they are part of the same "case or controversy" as a federal law claim such as the DTSA.[249] The alleged breach of a CNC is often factually intertwined with a federal trade secrets claim under the DTSA because one of the main purposes of a noncompete is to protect against the disclosure of trade secret information to a competitor.[250] As a result, employment disputes involving CNCs and/or NSA are being swept into federal court when, prior to the DTSA, they would have been heard in state court instead.[251]

B. Directions for Future Research

There are a number of potential directions for expansion of this study's empirical research into noncompetes and other post-employment restraints on competition. First, the number of employee agreements studied could be significantly expanded. This empirical study included slightly over 500 employment agreements that were identified in 689 cases, representing a single year of trade secret litigation in federal court under the DTSA. However, the entirety of trade secret litigation is much larger. For instance, Lex Machina[252] recently released a module of over 9600 trade secret cases filed in federal court since 2009.[253] If these cases contain employment agreements with CNCs and/or NSAs at a rate comparable to the current dataset, this would result in thousands of additional documents for coding and incorporation into the dataset.

Second, the existing employment agreements (and any additional ones) could be coded for more variables. For instance, employers in these agreements could be coded based on size and location.[254] In addition, employee job types

that some employers "may ask their employees to sign" contracts with unenforceable noncompete clauses, "presumably counting on the *in terrorem* value of the contract when the employee does not know that the contract is unenforceable").

248. *See* Levine & Seaman, *supra* note 177, at 143 tbl.4 (finding that 70% of DTSA lawsuits also involved a breach of contract claim).

249. 28 U.S.C. § 1367(a); *see also* Exxon Mobil Corp. v. Allapattah Servs., Inc., 545 U.S. 546, 558 (2005) (explaining that § 1367(a) confers "broad grant of supplemental jurisdiction over other claims within the same case or controversy, as long as the action is one in which the district courts would have original jurisdiction").

250. *See supra* notes 67–70 and accompanying text.

251. *See* Dennis Crouch, *DTSA as a Shoe Horn for Contract and Employment Law Claims*, PATENTLY-O (Apr. 28, 2016), https://patentlyo.com/patent/2016/04/contract-employment-claims.html.

252. LEX MACHINA, https://lexmachina.com (last visited Apr. 19, 2021).

253. Press Release, Lex Machina, Lex Machina Launches Highly Anticipated Legal Analytics Module for Trade Secret Litigation (May 30, 2018), https://lexmachina.com/media/press/lex-machina-launches-highly-anticipated-legal-analytics-module-for-trade-secret-litigation.

254. Firm size information is available from a number of sources, including the U.S. Census Bureau's Survey of Business Owners and Self-Employed Persons (SBO) and the U.S. Department of Labor's Business

could be coded into more granular categories. Employment agreements could also be coded for information regarding the frequency and scope of non-disclosure agreements (NDAs). Furthermore, data regarding an employment contact's specified remedies for breach of a CNC, such as monetary damages, liquidated damages, preliminary and/or permanent injunctive relief, attorney's fees, and court costs, could be gathered.

Another possible area for future empirical research from employment agreements in trade secret litigation are other contractual terms regarding innovation. For instance, based on the Author's review, a number of employment contracts contain provisions regarding the assignment of inventions and patent rights. Some contracts also contain provisions regarding the employer's rights in other forms of intellectual property created by their employees during the course of employment, such as copyrights and trade secrets. In addition, many of the agreements included in the dataset also include language regarding remedies in the event that the contract's terms are breached, such as liquidated damages clauses and provisions awarding attorney's fees and court costs to a prevailing employer. In short, employment agreements publicly disclosed in trade secret litigation may prove to be a rich source of data regarding other contractual obligations that may affect the creation and ownership of intellectual property rights.

CONCLUSION

Noncompetes and other post-employment restraints on competition, such as nonsolicitation agreements, are one of the most significant and important issues not just in employment law, but in innovation policy and economic development as well. In light of the theoretical debate regarding the normative desirability of noncompetes, more data about the frequency, scope, and impact of these restraints is needed to assist policymakers who are grappling with these issues at both the federal and state levels.

This study makes a modest contribution to that effort by collecting and reporting information regarding an original dataset of employment agreements containing noncompetes and/or nonsolicitation agreements that have been publicly disclosed in trade secret litigation. Based on this data, it appears that the use of noncompetes by U.S. employers goes well beyond the C-suite and often extends to technical and sales staff. In addition, although employees subject to noncompetes often are well compensated, some lower-wage workers are also subject to them. Furthermore, it appears that firms employing California-based workers are using nonsolicitation agreements as an alternative to noncompetes. Finally, the data and methodology used in this study can be adapted to study a number of additional issues at the intersection of contract and employment law and innovation policy.

Employment Dynamics data. *See Survey of Business Owners and Self-Employed Persons (SBO)*, U.S. CENSUS BUREAU, https://www.census.gov/programs-surveys/sbo.html (last visited Apr. 19, 2021); *Business Employment Dynamics*, U.S. BUREAU OF LAB. STAT., https://www.bls.gov/bdm/ (last visited Apr. 19, 2021).

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PRESIDENT BIDEN'S EXECUTIVE ORDER ON COMPETITION: AN ANTITRUST ANALYSIS

Herbert Hovenkamp*

In July 2021, President Biden signed a far-ranging Executive Order directed to promoting competition in the American economy. The Order is not limited to antitrust enforcement but extends over a wide range of situations where more competitive processes or outcomes could be beneficial. Some federal agencies are already responding.

This paper examines the Executive Order and considers how it should be implemented. The result could be important shifts in antitrust policy, as well as related policies involving patents, telecommunications, and agriculture.

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* James G. Dinan University Professor, University of Pennsylvania Carey Law School and the Wharton School. Thanks to Alezeh Ruff for research assistance.

INTRODUCTION

In July 2021, President Biden signed a far-ranging Executive Order ("EO") directed to promoting competition in the American economy.[1] Not mentioned by the EO is a closely related action—namely the Federal Trade Commission's ("FTC") withdrawal of its 2015 "Statement of Enforcement Principles."[2] That statement did two things, both of which were regarded as narrowing the FTC's ability to bring more expansive antitrust claims. First, it observed that the Commission would be guided by what it called the "consumer welfare" principle, without explaining the meaning of that term. Second, it stated that practices evaluated under § 5 of the FTC Act would be evaluated under "a framework similar to the rule of reason."[3]

The FTC's withdrawal of its "Statement of Enforcement Principles" is significant because it may open the way for the FTC to do more things along the lines that the EO contemplates. Although the withdrawal has produced some hand wringing even from sources such as the *Washington Post* Editorial Board,[4] repeal of this statement is overall a good thing. First, use of the "consumer welfare" principle has become so fraught with ambiguity that it is useless unless it is given a more precise meaning. For example, it is often used today to justify antitrust conduct that clearly harms consumers.[5] Second, the rule of reason has become a powerful vehicle for antitrust underenforcement, a point that even conservative Justice Gorsuch acknowledged in his recent opinion in *NCAA v. Alston*.[6] Without significant reform in how the courts approach the rule of reason, the FTC is wise not to limit itself in that way.

Third, the *Washington Post* Editorial Board writes as if the Sherman Act applies clear rules while § 5 of the FTC Act permits unspecified overreaching. That is an exaggeration. The language of the two relevant sections of the Sherman Act

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1. Exec. Order No. 14036 on Promoting Competition in the American Economy, 86 Fed. Reg. 36,987 (July 9, 2021).

2. Statement of Enforcement Principles Regarding "Unfair Methods of Competition" Under Section 5 of the FTC Act (withdrawn), https://www.ftc.gov/system/files/documents/public_statements/735201/150813section5enforcement.pdf.

3. *Id.*

4. *Opinion: Don't Want the FTC to Act on Antitrust? Tell Congress to Get Moving*, WASH. POST (July 11, 2021, 8:00 AM), https://www.washingtonpost.com/opinions/2021/07/11/dont-want-ftc-act-antitrust-tell-congress-get-moving/ [https://perma.cc/W7GP-EUTM].

5. *See, e.g.*, FTC v. Actavis, Inc., 570 U.S. 136, 160–61 (2013) (Roberts, C.J., dissenting) (stating that goal of antitrust laws is to promote "consumer welfare" but then voting to approve a patent settlement that would have led to enormous price increases in drugs based on doubtful patents); Ohio v. Am. Express Co., 138 S. Ct. 2274, 2290 (2018) (majority opinion) (adhering to "consumer welfare" principle while validating a policy that caused higher prices in every case where it was applied); Herbert Hovenkamp, *Antitrust Harm and Causation*, 99 WASH. UNIV. L. REV. 787 (2021).

6. NCAA v. Alston, 141 S. Ct. 2141, 2160–61 (2021); *see* Herbert Hovenkamp, *A Miser's Rule of Reason: Student Athlete Compensation and the Alston Antitrust Case*, NYU ANN. SURV. AM. L. (forthcoming 2022), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3879580 [https://perma.cc/53B7-3HST].

("restrain trade" and "monopolize")[7] are both associated more with practices that reduce output anticompetitively, although they give no detail.[8] The condemnation of "unfair methods of competition" in § 5 of the FTC Act[9] suggests a more tort-like approach that could reach beyond output-reducing content. Neither set of provisions describes proscribed conduct with anything approaching precision. Further, nothing in any of the statutes suggests a consumer welfare principle nor the years of judge-made law that has defined it, including the rule of reason. What § 5 lacks is a long line of antitrust precedents that define its boundaries in a way similar to the extensive caselaw interpreting the equally opaque provisions of the Sherman Act. In fact, important precedents in competition law prior to the issuance of this statement of principles interpreted § 5 as not reaching very far beyond the Sherman Act.[10] A much better case can be made that § 5 jurisprudence has not been pushed far enough.

Fourth, there is a good reason for using § 5 of the FTC Act to reach beyond the Sherman Act: as a standalone provision, § 5 cannot be enforced by private plaintiffs. Much of the overreaching in the antitrust laws has come about in private actions, motivated mainly by the availability of treble damages and attorneys' fees.[11] As a result, when the FTC wants to use § 5 to reach out it need not worry about debilitating damages actions and—what frequently goes with them—jury trials.

Repeal of the "Statement of Enforcement Principles" does come with one warning, however: it does not turn § 5 into a license to go after private wrongs that do not injure competition. One common criticism of the *Federal Trade Commission v. Brown Shoe* decision, which first applied this expansionist principle, was that Brown Shoe was not doing anything anticompetitive.[12] It was imposing exclusive dealing ("single branding") on a large number of small retail stores that sold its shoes, effectively turning them into its franchisees. The market was unconcentrated, Brown's own market share was small, and entry at the retail level was undoubtedly easy.[13] Further, the individual franchise stores were free to terminate their franchise agreements at will, and even under the franchise agreements about 25% of their sales were of products produced by competitors.[14] Today a ruling this broad would very likely wipe out the franchise agreements of many of the larger fast foods chains and the automobile industry. The Court simply did not understand how modern distribution systems work. Rather, the ruling was based on a quaint image of an economy in which small manufacturers produced their products and were done. Retailers simply purchased them and resold them at will.

The danger that the FTC might overreach lies mainly in the high degree of subjectivity that can go into determination of what is "unfair," as opposed to what

7. 15 U.S.C. §§ 1, 2.
8. *See* Hovenkamp, *Antitrust Harm*, *supra* note 5.
9. 15 U.S.C. § 45.
10. *E.g.*, E.I. Du Pont de Nemours & Co. v. FTC, 729 F.2d 128 (2d Cir. 1984) (refusing to condemn parallel pricing plus facilitating practices as collusive in the absence of evidence of an agreement).
11. 15 U.S.C. § 15.
12. FTC v. Brown Shoe Co., 384 U.S. 316 (1966).
13. See the Eighth Circuit's opinion, *Brown Shoe Co. v. Federal Trade Commission*, 339 F.2d 45, 49 (8th Cir. 1964).
14. *Id.* at 50.

restrains trade or monopolizes. Interpreting the two sections of the Sherman Act can be difficult, mainly because both markets and firms are complex. But the general goal is coherent: identify and sanction practices that tend to reduce output (measured by quantity, quality, or innovation) and raise prices beyond what could realistically be made to prevail under competition. The problem with "unfair" methods of competition is that it encompasses a wide range of meanings that have historically been given to anticompetitive, competitively neutral, and sometimes even beneficial behavior. For example, the decades long battle over "fair trade" produced recipes for protecting small business from more efficient competitors,[15] for choosing business over consumers and labor in battles over pricing, or for condemning vertical integration simply because integrated firms could undersell unintegrated rivals.[16]

While the EO has been touted as a "progressive" document,[17] its content falls short of that. It does not suggest that the antitrust enforcement agencies break up any firms, other than becoming more aggressive about mergers. Nor does it contain any general expression of concern about vertical integration as such or advocacy for removal of antitrust immunities. Consistent with antitrust policy generally, it repeatedly expresses concerns about market power or the power to profit by charging high prices, but it never complains about large firm size as such or suggest that low prices are bad because they harm small business.[18] Further, while it discusses market power repeatedly, it does not speak about displacing antitrust's

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15. *See, e.g.*, Edward D. Cavanagh, *Vertical Price Restraints After Leegin*, 21 LOY. CONSUM. L. REV. 1, 20–21 (2008) (noting the consensus that "fair trade" regimes which encouraged vertical price restraints led to higher prices but did not produce offsetting benefits); *see also* 8 PHILLIP E. AREEDA & HERBERT HOVENKAMP, ANTITRUST LAW ¶ 1604 (4th ed. 2018) (collecting sources). On the history, see LAURA PHILLIPS SAWYER, AMERICAN FAIR TRADE: PROPRIETARY CAPITALISM, CORPORATISM, AND THE "NEW COMPETITION," 1890–1940 (2018) and Herbert Hovenkamp, *The Sherman Act and the Classical Theory of Competition*, 74 IOWA L. REV. 1019, 1063–64 (1989) (describing small druggists' concerted campaign to use resale price maintenance to pursue "aggressive cutters," the term used to describe discounters).

16. A good example is the district court's opinion in the *Brown Shoe* vertical merger case, which the Supreme Court affirmed. The court condemned the merger precisely because it enabled the post-merger firm to sell better shoes:

> [I]ndependent retailers of shoes are having a harder and harder time in competing with company-owned and company-controlled retail outlets. National advertising by large concerns has increased their brand name acceptability and retail stores handling the brand named shoes have a definite advertising advantage. Company-owned and company-controlled retail stores have definite advantages in buying and credit; they have further advantages in advertising, insurance, inventory control . . . and price control. These advantages result in lower prices or in higher quality for the same price and the independent retailer can no longer compete . . . .

United States v. Brown Shoe Co., 179 F. Supp. 721, 738 (E.D. Mo. 1959), *aff'd*, 370 U.S. 294 (1962).

17. *See* Phil Gramm & Mike Solon, *Biden Turns Back the Progressive Clock*, WALL ST. J. (July 14, 2021, 2:12 PM), https://www.wsj.com/articles/biden-turns-back-the-progressive-clock-11626286594 [https://perma.cc/4YBR-WYTC].

18. Exec. Order, *supra* note 1, at 36,987–88.

current economic approach with concerns about political power or large firm size. To the contrary, it makes no reference to political power at all, except for this one telling passage that it quotes from a 1957 Supreme Court decision declaring that the Sherman Act:

> [R]ests on the premise that the unrestrained interaction of competitive forces will yield the best allocation of our economic resources, the lowest prices, the highest quality and the greatest material progress, while at the same time providing an environment conducive to the preservation of our democratic political and social institutions.[19]

The passage is important for what it does *not* say about political power, even during a period of great antitrust expansion. The goals are to achieve the best allocation of economic resources, lowest prices, highest quality, and greatest material progress—but all of this within an environment that is conducive to the preservation of our democratic institutions. That is hardly an endorsement of the proposition that antitrust should ignore economic concerns in favor of political ones. The EO could as easily have been written by Friedrich Hayek or Milton Friedman.

Of course, rulemaking of an unspecified scope such as the EO contemplates could reach further. The EO does represent a more aggressive approach to antitrust policy than has been reflected in the recent past. It is also a significant corrective for an anti-enforcement bias that has hampered antitrust policy for decades, that was never economically justified, and that continues to affect portions of the federal judiciary.[20]

This Article briefly examines those portions of the Executive Order that are most immediately relevant to antitrust policy. It does not discuss recommendations that are likely to be carried out through means unrelated to antitrust enforcement.[21] To be sure, nearly any area of the economy may end up raising antitrust concerns, but that is largely because the antitrust laws are not limited to a specific sector. Their scope is nearly as broad as the scope of congressional power to regulate commerce. Further, fact finding may uncover some antitrust violations. For example, high baggage handling fees, high prices for defense contracting, or high prices for beer distribution may all involve antitrust violations if they result from collusion. A

19. N. Pac. Ry. Co. v. United States, 356 U.S. 1, 4 (1958). This case is quoted in the executive order. *See* Exec. Order, *supra* note 1, at 36,989.

20. *See* Herbert Hovenkamp, *Antitrust Error Costs*, UNIV. PA. J. BUS. L. (forthcoming 2022), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3853282 [https://perma.cc/DUK2-9PVF].

21. Because the EO is far ranging, many of the things it discusses are likely to be addressed by institutions outside of antitrust. These include net neutrality and other broadband regulation, unfair data collection and surveillance, control over aviation and baggage fees, bottlenecks in public transportation, plant and seed protection through the patent system, wine and beer distribution, pricing and distribution of hearing aids, transparency in hospital and medical services pricing, prescription drug pricing both in the general insurance markets and via programs such as Medicare, defense contracting, issues relating to consumer mobility among financial institutions, and competitive development of nascent technologies such as pilotless drones.

number of provisions may or may not have antitrust consequences depending on what happens next, and future legislation could sweep in some of them.

One of the reasons so many areas of concern covered by the EO do not immediately implicate the antitrust laws is its expression of a "whole of government" competition policy. This policy urges competitive solutions both through the antitrust laws and to other areas of law in which competitive concerns are prominent.[22] One good result of a presidentially supported "whole of government" approach to competition policy is more attention given to competition concerns by the relevant agencies and federal judges when they are applying bodies of law other than antitrust.[23] This can cut both ways. On the one hand, it can increase attentiveness to competition issues in non-antitrust enforcement. On the other hand, it can also yield more regulation in situations where the uncontrolled market is viewed as failing because it is unreasonably restrictive or biased.

One example of this is the EO's strong commitment to net neutrality, or the imposition of common-carrier-like nondiscrimination rules on the suppliers of internet services.[24] These are stated in a section of the EO addressed to the Chair of the Federal Communications Commission ("FCC") entitled, "To promote competition, lower prices, and a vibrant and innovative telecommunications ecosystem."[25] The EO expresses an analogous similar concern that communications-spectrum auctions be organized in ways that distribute purchasers widely and evenly, prevent hoarding, or create entry barriers.

While this approach of declaring greater amounts of regulation to be "competitive" might seem odd today, it is strictly consistent with the neoclassical approach to regulation: permit markets to do their job when they can, but use regulation that corrects market failures with a goal of emulating competition as closely as possible.[26] On the other hand, it is inconsistent with a theory of regulation widely shared by neoliberals since the 1970s that regulation is little more than the

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22. Exec. Order, *supra* note 1, at 36,989. The EO expressly refers to the Packers and Stockyards Act, the Federal Alcohol Administration Act (Public Law 74-401, 49 Stat. 977, 27 U.S.C. § 201 et seq.), the Bank Merger Act, the Drug Price Competition and Patent Term Restoration Act of 1984 (Public Law 98-417, 98 Stat. 1585), the Shipping Act of 1984 (Public Law 98-237, 98 Stat. 67, 46 U.S.C. § 40101 et seq.), the ICC Termination Act of 1995 (Public Law 104-88, 109 Stat. 803), the Telecommunications Act of 1996, the Fairness to Contact Lens Consumers Act (Public Law 108-164, 117 Stat. 2024, 15 U.S.C. § 7601 et seq.), and the Dodd–Frank Wall Street Reform and Consumer Protection Act (Public Law 111-203, 124 Stat. 1376) (Dodd–Frank Act).

23. *Cf.* Tom Christensen & Per Laegreid, *The Whole-of-Government Approach to Public Sector Reform*, 67 PUB. ADMIN. REV. 1059 (2007).

24. As expressed during the Obama Administration by the FCC, Protecting and Promoting the Open Internet, 80 Fed. Reg. 19,738 (Apr. 13, 2015).

25. Exec. Order, *supra* note 1, at 36,994.

26. On the neoclassical approach to regulation, see Herbert Hovenkamp, *Regulation and the Marginalist Revolution*, 71 FLA. L. REV. 455 (2019). The classic treatment is ALFRED E. KAHN, THE ECONOMICS OF REGULATION: PRINCIPLES AND INSTITUTIONS (2d ed. 1988).

purchase of economic access or exclusion by interest groups.[27] The EO at least implicitly recognizes that the neoclassical theory is almost always better, but only if the government is capable of sticking to it without playing favorites or letting politics intervene.

I. MONOPOLY IN THE AMERICAN ECONOMY

The EO correctly describes the state of competition in the American economy as declining but does so in terms of "consolidation" and "excessive market concentration."[28] Today the level of concentration in American markets is hotly disputed, as are the methodologies for assessing it. Much of the uncertainty results from the types of data that are used to define markets. Because "concentration" refers to the number of firms in a market, it is essential that markets be defined accurately. The most widely used data for this purpose, which are from the U.S. Census, offer incredibly poor correlations with higher concentration in properly defined markets.[29] To say that the data are "useless" might be an exaggeration, but not by much.

There are better ways of assessing the amount of market power in the economy—namely, by direct measurement of price-cost margins. In a competitive economy, overall prices should be reasonably close to marginal costs, with some adjustments for innovation and other fixed costs. Monopoly power is measured directly in terms of high price-cost margins.[30] The measurement tools that we have today for direct measurement of price-cost margins are much more accurate and relevant to the task than concentration numbers driven by census data.[31] For example, these approaches do not need to worry about such things as whether markets are national, regional, or local, nor about variations in the correlation

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27. George J. Stigler, *The Theory of Economic Regulation*, 2 BELL J. ECON. & MGMT. SCI. 3, 6 (1971) (devoting no discussion to natural monopoly, high fixed costs, bottlenecks or other economic indicia of market failure, but instead only the purchase of exclusive rights from government officials).

28. Exec. Order, *supra* note 1, at 36,987.

29. *See* Carl Shapiro, *Antitrust in a Time of Populism*, 61 INT'L. J. INDUS. ORG. 714, 726 (2018); Herbert Hovenkamp & Carl Shapiro, *Horizontal Mergers, Market Structure, and Burdens of Proof*, 127 YALE L.J. 1996 (2018).

30. William M. Landes & Richard A. Posner, *Market Power in Antitrust Cases*, 94 HARV. L. REV. 937, 939 (1981); HERBERT HOVENKAMP, FEDERAL ANTITRUST POLICY: THE LAW OF COMPETITION AND ITS PRACTICE, ch. 3 (6th ed. 2020).

31. Good recent examples are Jan De Loecker, Jan Eeckhout & Gabriel Unger, *The Rise of Market Power and the Macroeconomic Implications*, 135 Q.J. ECON. 561 (2020) (seeing dramatic rise in margins since 1980) and Robert E. Hall, *Using Empirical Marginal Cost to Measure Market Power in the U.S. Economy* (NBER Working Paper, 2018), https://www.nber.org/papers/w25251 [https://perma.cc/8SKQ-HLLJ]. *See* Hall, *supra*, at 18 (finding "substantial growth in market power" over the period from 1988 to 2015, although less than some others); Jan De Loecker, Jan Eeckhout & Simon Mongey, *Quantifying Market Power and Business Dynamism in the Macroeconomy* (CEPR Discussion Paper, May 2021), https://repec.cepr.org/repec/cpr/ceprdp/DP16097.pdf [https://perma.cc/C8HM-AEYV]; David Autor et al., *The Fall of the Labor Share and the Rise of Superstar Firms* (NBER Working Paper, May 2017), https://www.nber.org/papers/w23396 [https://perma.cc/54EL-2YMS].

between structure and power. That is, direct measurement enables us to estimate the extent of monopoly without the need to define a market.

The EO does not mention margins or direct measurement. Nevertheless, the story, at least at the general level, is quite consistent with the account given in the EO: price-cost margins have been rising, particularly since the 1980s. These new approaches also permit something that concentration data do not, and that is determine where the increased returns are going. While the returns to capital have increased significantly, the share of returns that goes to labor has been seriously in decline, particularly among those who are less skilled.[32]

Although antitrust policy did become significantly less aggressive in the 1980s and following, this cannot be more than partly to blame for these declines in performance. They are also attributable to generally hostile attitudes toward organized labor that have prevailed since the 1980s. In sum, these newer methodologies for measuring monopoly provide support for several initiatives in the EO, including those addressing the decline in labor competition. Just as we need more aggressive antitrust enforcement in some areas, we also need more aggressive support for labor and worker mobility, as well as for education and the other institutions that support them.

II. "NEW INDUSTRIES AND TECHNOLOGIES"

The EO refers to the "challenges posed by new industries and technologies," which include the "dominant internet platforms."[33] That is a good and positive way of expressing the issue. The giant platforms that have been in the crosshairs of Congress and other areas of public debate (mainly Amazon, Apple, Meta (Facebook), and Alphabet (Google)) are new industries and technologies. These large platforms are not fundamentally a menace to society, although they certainly do raise competitive concerns. They have also been a principal contributor to economic growth, and the higher output that they facilitate benefits both consumers and labor as well as other businesses that interact with them.[34]

The reason that the big platforms are so successful, of course, is that consumers like them. It takes a special measure of arrogance and, in any event, would be political suicide to ignore consumer behavior. Nevertheless, metered antitrust relief of proven anticompetitive conduct is appropriate, and that is where antitrust's litigation-driven, fact-intensive approach is valuable. Further, the focus

32. See Autor et al., *supra* note 31; Matthias Kehrig & Nicolaw Vincent, *The Micro-Level Anatomy of the Labor Share Decline*, 136 Q.J. ECON. 1031 (2021) (showing a significant decline at the macro level, but instability at the firm level). For an attempt to link rising corporate returns and declining labor share to Chicago School antitrust policy, see Erdogan Bakir, Megan Hays & Janet Knoedler, *Rising Corporate Power and Declining Labor Share in the Era of Chicago School Antitrust*, 55 J. ECON. ISSUES 397 (2021). *See also* Suresh Naidu, Eric A. Posner & Glen Weyl, *Antitrust Remedies for Labor Market Power*, 132 HARV. L. REV. 536 (2019).

33. Exec. Order, *supra* note 1, at 36,988.

34. *See* Joshua P. Zoffer, *Short-Termism and Antitrust's Innovation Paradox*, 71 STAN. L. REV. ONLINE 308 (2019).

should be on remedies that tend toward higher output, increased consumer satisfaction, and more opportunities for labor and other input suppliers.

The relationship between a dominant platform such as Amazon and the numerous small businesses who are affected by it is very complex and cannot be captured in a single sentence. Amazon, as well as other large internet firms, has clearly injured many small businesses forced to compete with it. On the other hand, Amazon has also supplied distribution services to many small businesses, who are able to reach broader markets as a result.[35] While there are some vague similarities with the "chain stores" that were the target of Justice Louis Brandeis's wrath a century ago, there are also important differences.[36] The war between family-owned single stores and large multistore operators such as Macy's, Woolworth's, the Great Atlantic and Pacific Tea Company ("A&P"), and Sears was far more devastating to small business than the one between online sellers such as Amazon and smaller retailers. For example, A&P simply put its products in competition with family-owned grocers, who had no choice but to compete.[37] By contrast, Amazon often becomes their internet broker, enabling many small businesses to find markets that they could not otherwise reach.[38] Others have been pressured into expanding their own online presence on other platforms. That is, for many small businesses the story has been repositioning and reaching out rather than bankruptcy.

In any event, the Brandeisian war against the chain stores utterly failed. Changing demographics are hard to resist, and the Brandeis movement for widespread use of resale price maintenance ("fair trade") and discriminatorily high taxes on multistore owners[39] has given way to a consumer culture that has few qualms about shopping at large retailers. More importantly, a policy of forcing

35. *See, e.g.*, Brock Blake, *Amazon: Small Business Friend or Foe?*, FORBES (Sep. 23, 2019, 10:23 AM), https://www.forbes.com/sites/brockblake/2019/09/23/amazon-friend-or-foe/?sh=27f171057367 [https://perma.cc/AMG2-SAPV].

36. For a balanced evaluation of the issues, including Justice Brandeis's involvement, see Richard C. Schragger, *The Anti-Chain Store Movement, Localist Ideology, and the Remnants of the Progressive Constitution, 1920-1940*, 90 IOWA L. REV. 1011 (2005). On the "fair trade" movement to impose resale price maintenance on discounters, see LAURA PHILLIPS SAWYER, AMERICAN FAIR TRADE: PROPRIETARY CAPITALISM, CORPORATISM, AND THE "NEW COMPETITION," 1890–1940 (2017).

37. *See* FRED ROWE, PRICE DISCRIMINATION UNDER THE ROBINSON–PATMAN ACT 11–23 (1962) (noting a large number of small grocers bankrupted by A&P led to passage of Robinson–Patman Act); Hugh C. Hansen, *Robin-Patman Law: A Review and Analysis*, 51 FORDHAM L. REV. 1113, 1119–24 (1983); JOSEPH C. PALAMOUNTAIN, JR., THE POLITICS OF DISTRIBUTION (1955) (similar, but more detailed).

38. *See Amazon Has 1.9 Million Active Sellers Worldwide (Plus Other Stats)*, EDESK (Jan. 31, 2022), https://www.edesk.com/blog/amazon-statistics/ [https://perma.cc/58KJ-Y8P8] (stating that Amazon has 1.9 million active third-party sellers and 9.7 million sellers worldwide).

39. *See* Louis K. Liggett Co. v. Lee, 288 U.S. 517 (1933) (striking down progressive tax on chain stores whose rate increased with the number of stores, over a dissent by Justice Brandeis). J.C. Penney, F.W. Woolworth Co., Montgomery Ward & Co., A&P, Kinney Shoes, United Cigar Stores, and other retail chains were listed among the affected stores. *See* Louis K. Liggett Co. v. Amos, 141 So. 153 (1932), *rev'd sub nom.* Liggett v. Lee, 288 U.S. 517 (1933).

higher costs on larger retailers in order to protect smaller ones hurts low-income people the most.[40] The enemy is high prices and inadequate access to low-cost alternatives, not size. A policy of expanding broadband access into low-income and other underserved populations is almost certain to have a much bigger welfare payoff than one of disciplining online retailers simply because they are big.

Anticompetitive practices that reduce output and raise prices are another matter. It seems clear that anticompetitive things are happening, and large e-retailers such as Amazon could be performing more competitively than they are. One important thing for the FTC to do is to study large online sellers and sort out the good from the bad. These conclusions will strongly affect the remedy. Overly aggressive remedies applied with too little thought could injure large numbers of consumers who benefit from low prices and wide access. Any remedy that reduces output will also injure labor as well as other suppliers. Particularly at the lower, or hourly wage, end of the labor spectrum, employment opportunities and wages are closely linked to product market output.[41]

The EO does not mention any of the dominant digital platforms by name, does not weigh in on the question whether they have substantial market power, and does not call for breakups. While it does not accuse any particular platform of an anticompetitive practice, it does list several practices that should be investigated and pursued—namely, "serial mergers, the acquisition of nascent competitors, the aggregation of data, unfair competition in attention markets, the surveillance of users, and the presence of network effects."[42]

The inclusion of network effects is a mystery, as if they were inherently a bad thing. The dramatic growth of networks since the second half of the twentieth century has produced extraordinary economic growth and benefitted nearly everyone, although some more than others.[43] The task is not to get rid of them, which we could not do without reversing the telecommunications and internet revolution. Rather, government policy, including antitrust, should try to ensure that networked markets operate competitively and as openly as realistically possible.

The EO also makes a point of stating that nothing in the relevant portions of the EO should "be construed to suggest that the statutory standard . . . should be displaced or substituted by the judgment of the Attorney General or the Chair of the FTC."[44] While that statement is of course true as a matter of law, the EO seems intent on confirming that the document should not be read as a license on the part of the antitrust enforcement agencies to go beyond existing law, at least not until such

40. *See* Ethan Kay & Woody Lewenstein, *The Problem with the Poverty Premium*, HARV. BUS. REV. (Apr. 2013), https://hbr.org/2013/04/the-problem-with-the-poverty-premium [https://perma.cc/E7SV-8C8F] (noting that low-income people pay much higher prices for most things than middle-class consumers do in the absence of large stores offering low prices).

41. *See* S. Nickell et. al, *Wages and Product Market Power*, 61 ECONOMICA 457 (1994).

42. Exec. Order, *supra* note 1, at 36,988.

43. *See generally* YOCHAI BENKLER, THE WEALTH OF NETWORKS: HOW SOCIAL PRODUCTION TRANSFORMS MARKETS AND FREEDOM (2006).

44. Exec. Order, *supra* note 1, at 36,990.

times as additional laws might be passed. Later, the EO encourages the heads of these two agencies "to enforce the antitrust laws fairly and vigorously."[45]

III. "UNFAIR COMPETITION IN MAJOR INTERNET MARKETPLACES"

While nothing in the EO suggests aggressive structural remedies against the large internet markets, it clearly supports expanded enforcement against anticompetitive practices. This is one area where the FTC in particular could do much good. "Major internet marketplaces" presumably refers to large internet sellers (which the EO does not name). Amazon is certainly a target, although there are others.

The idea of unfair competition, which implicitly invokes § 5 of the FTC Act,[46] has provoked controversy with respect to sellers who simultaneously sell their own products in competition with those of third parties. The complaints range from antitrust claims that Amazon imposes anticompetitive most-favored-nation ("MFN") clauses on its third-party merchants,[47] that it steals information from its own third-party vendors and uses it to make look-alike copies,[48] and other claims akin to exclusive dealing or tying.[49] MFN's, which are already the subject of both state attorney general and private litigation against Amazon,[50] are clauses that require Amazon's third-party suppliers to provide Amazon with terms that are at least as favorable as those supplied to others, or that prohibit them from dealing with firms who charge less than Amazon charges.[51] Some of these provisions have been withdrawn, possibly in contemplation of antitrust litigation.[52] But there may be others, and even withdrawn policies can be subject to an injunction to prevent them from recurring. These are matters for fact finding and litigation or rulemaking.

45. *Id.* at 36,991.

46. 15 U.S.C. § 45 ("Unfair methods of competition . . . are hereby declared unlawful.").

47. *E.g.*, Complaint, District of Columbia v. Amazon.com, Inc., No. __ (Sup. Ct. D.C. May 25, 2021), https://oag.dc.gov/sites/default/files/2021-05/Amazon-Complaint-.pdf.

48. *See* Investigation of Competition in Digital Markets, Majority Staff Report and Recommendations 274–81, U.S. House of Representatives, Subcommittee on Antitrust Commercial and Administrative Law of the Committee on the Judiciary (2020).

49. *Id.* at 287–92.

50. Complaint, District of Columbia v. Amazon.com, Inc., No. __ (Sup. Ct. D.C. May 25, 2021), https://oag.dc.gov/sites/default/files/2021-05/Amazon-Complaint-.pdf; *see* David McCabe et al., *D.C. Accuses Amazon of Controlling Online Prices*, N.Y. TIMES (May 25, 2021), https://www.nytimes.com/2021/05/25/business/amazon-dc-lawsuit.html [https://perma.cc/TY7J-3NQE]. In addition, a class of purchasers has filed a lawsuit challenging MFNs in e-books under federal antitrust law. Complaint, Fremgen v. Amazon, No. 1:21-cv-00351-GHW-DCF (S.D.N.Y. Feb. 3, 2021), https://www.hbsslaw.com/sites/default/files/case-downloads/amazon-ebooks-price-fixing/02-04-21-amended-complaint.pdf [https://perma.cc/F47L-XSFG].

51. *See* Jonathan B. Baker & Fiona Scott Morton, *Antitrust Enforcement Against Platform MFNs*, 127 YALE L.J. 2176 (2018).

52. *See, e.g.*, *Amazon Eases Price Restrictions on Third-Party Vendors*, FIN. TIMES (Mar. 11, 2019), https://www.ft.com/content/3beea4a6-445b-11e9-b168-96a37d002cd3 [https://perma.cc/H5UW-GF3Y].

In any event, judicially created legal standards should become more accommodating of enforcement. Under current law, vertical MFNs are presumably unlawful under the Sherman Act only if the defendant has a market share in excess of 30%–40%. MFNs are not unlawful per se because under the right circumstances they can serve competitive ends. For example, a competitive dealer invited to bid on a project may be more willing to bid if it has assurance that others are not being offered a better deal, with the result that its own offerings would not be competitive. But the 30%–40% market share requirement will knock out most claims against Amazon, because there are not that many products for which its shares are that large. E-books could be an exception, depending on how the market is defined.[53]

A better way to think about the MFN problem is to focus less on the total market share covered by the arrangement, but instead consider the role of marginal and inframarginal distributors. A large firm need not control a large share of a market if its own outlets are more desirable than those of others. In that case it may be able to impose higher costs on rival sellers simply because small producers need its business.[54] What needs to happen is adjudication or rulemaking that is based on good economic evidence, and that then addresses these practices and enjoins them without undermining the overall benefits of the defendant's distribution system. If the story about Amazon's MFNs is as reported and they are still in force, enjoining them could lead to higher output and reduced prices across the covered market. This is an area where FTC input, perhaps by rulemaking, could be beneficial. The FTC could also quite reasonably use its own economic expertise to investigate the effects of MFNs under § 5 and come up with a more aggressive rule than the Sherman Act currently employs.

The same thing is true of Amazon's allegedly discriminatory practices between its own products and the products that it sells as a broker or reseller for other firms on the same website. The commingled selling of one's own products with the products of third parties is a good thing, even for a dominant firm. Aggregate output increases if retail stores or platforms offer a variety of alternatives. Dual distribution of one's own and competitor's brands is a well-established practice, and it increases consumer choice by forcing firms to compete with each other even within a particular store or website.[55] For example, someone looking for an e-reader on Amazon will find Amazon's own Kindle products, Apple iPads, Barnes & Noble's Nook, Sony, and some others. Amazon's use of its own brands

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53. Amazon's share of the e-book market is roughly 67%, but e-books make up only about 21% of total book sales. That could give Amazon a market share of 67% if the relevant market is e-books, but more like 13% of books generally. For 2021 data, see ABOUT EBOOKS, https://about.ebooks.com/ebook-industry-news-feed/ [https://perma.cc/GHC8-D285] (last updated Mar. 22, 2022).

54. *See* Herbert Hovenkamp, *Vertical Control*, NYU L. REV. ONLINE (2021), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3793733 [https://perma.cc/LY3F-CRES]. The issue is explored further in 2B PHILLIP E. AREEDA & HERBERT HOVENKAMP, ANTITRUST LAW ¶ 570 (5th ed. 2021).

55. *See, e.g.*, Peter J. Boyle & E. Scott Lathrop, *The Value of Private Label Brands to U.S. Consumers: An Objective and Subjective Assessment*, 20 J. RETAILING & CONSUMER SERVS. 80 (2013); Rajeev Batra & Indrajit Sinha, *Consumer-Level Factors Moderating the Success of Private Label Brands*, 76 J. RETAILING 175 (2000).

resembles the widespread use of house brands by grocery chains, who often sell one or more house brands in competition with national brands, which are typically more heavily advertised. Initially many customers believed that house brands were inferior, but that perception has changed significantly.[56]

In the case of Amazon there are also concerns that Amazon uses nonpublic data collected from sales of third-party brands to design and engineer its own competing brands, or that it discriminates against third-party sellers in its Buy Box, which selects default alternatives among sellers of the same product.[57] Critics, such as Senator Elizabeth Warren during her campaign for President, choose examples from among the large number of very small merchants who sell on the Amazon website.[58] Amazon has in the past made copies of merchandise that it sells for some firms and then markets variations under its own brand.[59]

Others, however, point to situations when Amazon enters with its own brand against large manufacturers.[60] For example, Duracell is owned by Berkshire-Hathaway, a very large company. It sells alkaline household batteries on the Amazon website in competition with Amazon's own AmazonBasics house brand. Here the effect seems clear: the presence of the Amazon brand forces Duracell to cut its own price if it wants to make more sales.[61] That kind of competition between "house brands" and "name brands" brings higher output, lower prices for consumers, and a higher degree of choice. These things need to be investigated empirically and dispassionately, with an eye toward the possibility of conduct that violates the antitrust laws or perhaps intellectual property laws. When such conduct is discovered, the most effective and least disruptive remedy is most often an injunction that forces it to stop.[62]

Eliminating Amazon's right to sell its own house brand batteries in competition with Duracell will not solve any problem worth solving and will instead cause others. It will force higher prices by eliminating an important arena of low-switching-cost competition. To the extent the higher prices reduce output, it will also

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56. *See* Stephen J. Hoch, *How Should National Brands Think About Private Labels*, 37 SLOAN MGMT. REV. 89 (1996).

57. Selection of products for the Buy Box has produced some non-antitrust litigation. *See* Kangaroo Mfg., Inc. v. Amazon.com, Inc., 2019 WL 1280945 (D. Ariz. Mar. 20, 2019) (sustaining partially claims based on tortious interference, unfair competition, and trademark infringement). For good introductions to the Buy Box, see Nikolas Guggenberger, *Essential Platforms*, 24 STAN. TECH. L. REV. 237 (2021) and Ben Bloodstein, *Amazon and Platform Antitrust*, 88 FORDHAM L. REV. 187 (2019).

58. *See* Herbert Hovenkamp, *The Looming Crisis in Antitrust Economics*, 101 B.U. L. REV. 489, 540–42 (2021).

59. *See* Dana Mattioli, *Amazon Scooped Up Data from Its Own Sellers to Launch Competing Products*, WALL ST. J. (Apr. 23, 2020, 9:51 PM), https://www.wsj.com/articles/amazon-scooped-up-data-from-its-own-sellers-to-launch-competing-products-11587650015 [https://perma.cc/MAQ9-QWTB].

60. *See* Herbert Hovenkamp, *Antitrust and Platform Monopoly*, 130 YALE L.J. 1952, 2015 (2021).

61. *See* Julie Creswell, *How Amazon Steers Shoppers to Its Own Products*, N.Y. TIMES (June 23, 2018), https://www.nytimes.com/2018/06/23/business/amazon-the-brand-buster.html [https://perma.cc/QL4C-W872].

62. *See* Hovenkamp, *Antitrust and Platform Monopoly*, *supra* note 60, at 2016.

harm labor and other input suppliers. It will of course benefit Berkshire Hathaway by freeing it from an aggressive competitor, but that would not be something to crow about. More fundamentally, it would run counter to the entire thrust of this EO as well as President Biden's economic policy generally, which is to strengthen economic growth by bringing more output, more competition, lower prices, and broader choice to consumers. Antitrust's role in promoting economic growth is surely limited, but it should not operate as an affirmative obstacle.

IV. MERGERS

Merger policy in the United States is currently enforced by the two antitrust enforcement agencies acting mainly under guidelines issued in 2010 for horizontal mergers[63] and 2020 for vertical mergers.[64] There are no current guidelines for "conglomerate" mergers, which are mergers that are neither horizontal nor vertical. In addition, the focus of the current guidelines is against mergers that enable the parties to charge higher prices, whether it be the two parties to the merger or the entire market in which the merger occurs.

In September 2021, the FTC withdrew the 2020 Vertical Merger Guidelines ("VMG"), which had been jointly issued by the two agencies a few months earlier. That move seems ill-considered, and the rationales that the FTC gave for its withdrawal made no economic sense.[65] Guidelines are never perfect and are revised periodically. However, the best practice, which has always been followed, is to leave existing guidelines in place until new ones are issued. The principal effect of this early withdrawal is that the FTC will lose the benefit of these guidelines in vertical merger cases that are decided prior to their replacement. In the *Time-Warner* vertical merger cases, which the Justice Department lost prior to issuance of the VMGs, the court cited the fact that the guidelines had not been updated in more than thirty years.[66]

The more sensible approach would have been to leave the 2020 VMGs in place for whatever advantages they produce, which are many,[67] and work on more far-reaching guidelines. In any event, the unilateral withdrawal does not seem to be a good faith effort to comply with the EO, under which the Attorney General and

63. U.S. DEP'T OF JUST. & FTC, HORIZONTAL MERGER GUIDELINES (Aug. 19, 2010), https://www.justice.gov/atr/horizontal-merger-guidelines-08192010 [https://perma.cc/FS3Q-74Y7].

64. U.S. DEP'T OF JUSTICE & FTC, VERTICAL MERGER GUIDELINES (June 30, 2020), https://www.ftc.gov/system/files/documents/reports/us-department-justice-federal-trade-commission-vertical-merger-guidelines/vertical_merger_guidelines_6-30-20.pdf [https://perma.cc/34J9-8CEE].

65. *See* Carl Shapiro & Herbert Hovenkamp, *How Will the FTC Evaluate Vertical Mergers?*, PROMARKET (Sep. 23, 2021), https://promarket.org/2021/09/23/ftc-vertical-mergers-antitrust-shapiro-hovenkamp/ [https://perma.cc/Q7DY-FQD9].

66. United States v. AT&T, Inc., 916 F.3d 1029, 1037 (D.C. Cir. 2019).

67. *See, e.g.*, Herbert Hovenkamp, *Competitive Harm from Vertical Mergers*, 39 REV. INDUS. ORG. (2021), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3683386 [https://perma.cc/Y2NE-5YME].

the Chair of the FTC "are encouraged to review the horizontal and vertical merger guidelines and consider whether to revise those guidelines."[68]

Another problem is that mergers are not addressed in the guidelines as exclusionary practices, and that has turned out to be an important oversight. Many acquisitions of smaller firms by large tech platforms are very likely intended to prevent the emergence of these small firms as new competitors.[69] A July 2021 article in the *Wall Street Journal* observed that one feature of U.S. antitrust law has been its traditional reliance on the rise of upstarts to discipline monopoly—but that reliance is unjustified in an environment in which most of the promising upstarts are acquired by their potential rivals.[70] The FTC explicitly alleged in its Facebook complaint[71] that the reason Facebook acquired Instagram was because it feared Instagram's emergence as a viable competitor. Significantly, the FTC's challenge was under § 2 of the Sherman Act. The court sustained the amended complaint after noting the concern that a dominant firm could use a policy of buying up potential competitors in order to prevent the emergence of competition.[72]

New guidelines should address these issues with respect to all firms, including but not limited to the large digital platforms. The concerns include both mergers that are neither horizontal nor vertical, and the use of mergers to prevent the emergence of new rivals. Beyond that are other problems. For example, several recent empirical studies indicate that prices have increased following mergers that were close to the line of illegality but approved, indicating that the current thresholds are too lenient.[73] One thing that would go a long way is to eliminate an anti-enforcement bias that too often inclines courts to understate the competitive threats, while exaggerating anticipated efficiencies.[74]

V. LABOR AND EMPLOYEE NONCOMPETITION AGREEMENTS

The EO also recommends that the relevant enforcement agencies develop policies intended to protect workers from agreements that suppress wages or worker mobility.[75] It does not address another labor-related question which is in fact more weighty: how can antitrust policy ensure that labor markets are as robust and

68. Exec. Order, *supra* note 1, at 36,991.

69. *See* Kevin A. Bryan & Erik Hovenkamp, *Startup Acquisitions, Error Costs, and Antitrust Policy*, 87 UNIV. CHI. L. REV. 221 (2020).

70. Daniel Michaels & Brent Kendall, *U.S. Competition Policy Is Aligning with Europe, and Deeper Cooperation Could Follow*, WALL ST. J. (July 15, 2021, 3:40 AM), https://www.wsj.com/articles/u-s-competition-policy-is-aligning-with-europe-and-deeper-cooperation-could-follow-11626334844 [https://perma.cc/5QX4-25EU].

71. FTC v. Facebook, Inc., No. 20-3590 (JEB) (D.D.C. June 28, 2021), https://www.pacermonitor.com/view/ITKR63Y/FEDERAL_TRADE_COMMISSION_v_FACEBOOK_INC__dcdce-20-03590__0073.0.pdf?mcid=tGE3TEOA [https://perma.cc/9G4M-LTAA].

72. FTC v. Facebook, Inc., No. 20-3590 (JEB), 2022 WL 103308 (D.D.C. Jan. 11, 2022) (citing 3 PHILLIP E. AREEDA & HERBERT HOVENKAMP, ANTITRUST LAW ¶ 701 (4th ed. 2018)).

73. *E.g.*, JOHN KWOKA, MERGERS, MERGER CONTROL, AND REMEDIES: A RETROSPECTIVE ANALYSIS OF U.S. POLICY (2015).

74. *See generally* Hovenkamp & Shapiro, *supra* note 29.

75. Exec. Order, *supra* note 1, at 36,992.

competitive as they realistically can be?[76] The explicit agreements referenced in the EO cover a relatively small percentage of workers while the health of the overall market affects everyone who depends on wages.

The agreements referenced in the EO are those among *employers* to suppress wages or not to poach one another's employees. These agreements are already illegal per se under U.S. antitrust law and may be criminal offenses.[77] The reference is not to agreements among *employees* to withhold their labor for a higher wage. Most such agreements are immune from the antitrust laws under § 6 of the Sherman Act as well as several other provisions, and a long caselaw recognizing a labor immunity from antitrust.[78] The EO also urges the Attorney General and the FTC to consider revising the Antitrust Guidance for Human Resource Professionals, which the Agencies issued jointly in October 2016.[79] Those guidelines already make clear that naked anti-poaching or wage fixing agreements are illegal per se, while similar agreement in bona fide joint ventures that involve shared employment are not.[80] The current guidelines also take the position that exchanges of information about wages or other terms of employment are not illegal per se.[81] However, even an unaccepted invitation to engage in wage fixing can be unlawful under the FTC Act.[82] Such unaccepted invitations generally do not violate § 1 of the Sherman Act, which requires an "agreement" between the parties and does not contain an attempt offense. Section 5 of the FTC Act contains no such limitations, however. As a result, this is one of those areas where the FTC Act can reach further than the Sherman Act.[83]

The EO also urges the chair of the FTC to engage in rulemaking with respect to "unfair use of non-compete clauses" or other clauses limiting worker mobility. Here the problems are significant. Employee noncompete agreements are typically clauses contained in employment agreements that prohibit employees from

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76. On this, see Herbert Hovenkamp, *Labor's Interest in Antitrust*, UNIV. CHI. L. REV. (forthcoming 2022), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4015834 [https://perma.cc/BR6N-45ZG].

77. *See No-Poach Approach*, U.S. DEP'T OF JUST., ANTITRUST DIV. https://www.justice.gov/atr/division-operations/division-update-spring-2019/no-poach-approach [https://perma.cc/3VZV-LW9H] (last updated Sept. 30, 2019); *see also* Indictment, United States v. Surgical Care Affiliates, LLC, No. 3-21CR0011-L (N.D. Tex. Jan. 5, 2021), ECF No. 1 (discussing the naked market division among competitors in agreeing not to hire one another's senior level employees); Indictment, United States v. Davita, Inc., No. 21-cr-00229 (D. Colo. 2021), ECF No. 1 (discussing competitors agreeing not to hire or solicit one another's senior level employees).

78. *See* 15 U.S.C. § 17. On the scope of the labor immunity, see 1 PHILLIP E. AREEDA & HERBERT HOVENKAMP, ANTITRUST LAW ¶¶ 255–57 (5th ed. 2021).

79. U.S. DEP'T OF JUSTICE & FTC, ANTITRUST GUIDANCE FOR HUMAN RESOURCE PROFESSIONALS (Oct. 2016), https://www.justice.gov/atr/file/903511/download [https://perma.cc/G6GL-PQ8E].

80. *Id.* at 2.

81. *Id.* at 4.

82. *Id.* at 7.

83. *See infra* text accompanying note 95. On unaccepted solicitations under the FTC Act, see 6 PHILLIP E. AREEDA & HERBERT HOVENKAMP, ANTITRUST LAW ¶ 1419 (4th ed. 2018).

moving to competitors for a defined period after job termination. Historically they were used mainly to protect firms whose employees possessed significant trade secrets or managerial know-how, or else who had received substantial on-the-job training at their employers' expense.[84] In these cases, the fear was that hiring employers could free ride by stealing employees who possessed these things from their current employment. Even under these limitations there was always a question about whether employee noncompetition covenants produced the social benefits that were claimed for them.

For example, studies examining technically trained employees in California, which forbids most employee noncompete covenants, and Massachusetts, which enforces them, tended to conclude that the California model actually facilitated economic development more than the Massachusetts model. Indeed, some studies even suggested that the reason Silicon Valley grew up in the Stanford, California area—rather than near MIT and Harvard University in the Cambridge, Massachusetts area—was California's refusal to enforce agreements limiting employee mobility.[85] Others dispute these results.[86]

Even covenants that involve highly trained employees should be re-examined, and consideration should be given to less restrictive alternatives, including such things as direct enforcement for trade secret theft. If the studies in the majority are correct, however, a strong rule against enforcing such covenants may not do much harm and could even do some good. It does bear noting, however, that the bulk of noncompetition covenant enforcement actions occur under state statutory and common law.

A relatively recent phenomenon concerning noncompetes is more disturbing because it involves employees who have not received a high degree of technical training or generally do not possess valuable trade secrets. This current phenomenon is the widespread use of noncompetition agreements imposed on low wage workers who have minimal training in industries such as fast-food service. The covenants are hard to defend economically even on traditional grounds. As of this

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84. *See generally* Matt Marx, *The Firm Strikes Back: Non-Compete Agreements and the Mobility of Technical Professionals*, 76 AM. SOCIO. REV. 695 (2011).

85. David P. Twomey, *The Developing Law of Employee Non-Competition Agreements: Correcting Abuses: Making Adjustment to Enhance Economic Growth*, 50 N. ATL. REG. BUS. L. ASSN. 87 (2017), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3119986 (arguing that non-compete agreements limit worker mobility); Matt Marx, Jasjit Singh & Lee Fleming, *Regional Disadvantage? Employee Noncompete Agreements and Brain Drain*, 44 RES. POL. 394, 403 (2015) ("[E]mployee non-compete agreements encourage the migration of workers from states where such contracts are enforceable to states where they are not."); Paul Almeida & Bruce Kogut, *Localization of Knowledge and the Mobility of Engineers in Regional Networks*, 45 MGMT. SCI. 905 (1999) (noting that worker mobility is most conducive to the flow of knowledge). More qualified, but still finding a positive effect of California nonenforcement policy in the computer industry is Bruce Fallick, Charles A. Fleischman & James B. Rebitzer, *Job-Hopping in Silicon Valley: Some Evidence Concerning the Microfoundations of a High-Technology Cluster*, 88 REV. ECON. & STAT. 472 (2006).

86. *E.g.*, Jonathan M. Barnett & Ted Sichelman, *The Case for Noncompetes*, 87 UNIV. CHI. L. REV. 953 (2020).

writing a few franchisors have terminated these agreements in the face of antitrust litigation.[87]

A complicating factor for antitrust policy is that these covenants are vertical agreements and typically exist in competitively structured product markets. Many of those that are currently being litigated arise within single franchises. For example, *DesLandes v. McDonald's* was a challenge to noncompetition agreements that McDonald's placed in the franchise agreements of all of its franchisees, and that are drafted so as to prevent employees from moving from one McDonald's franchise location to another.[88] While a horizontal agreement of this nature between competing restaurants would be unlawful per se,[89] the McDonald's agreements are formally a set of vertical agreements between McDonald's as franchisor and each of its individual franchisees. Under current antitrust law a purely vertical agreement of this nature must be governed by the rule of reason,[90] and even a large fast-food company such as McDonald's does not possess the 30%–40% market share that the courts generally require for rule of reason illegality.[91]

The question whether these formally vertical noncompete agreements are actually horizontal and for the (anticompetitive) benefit of the competing franchisees can then be important. Sometimes the contract terms are a giveaway. For example, in declining to dismiss an antitrust complaint against a noncompete agreement imposed by the Jimmy John's sandwich franchise in its franchisee agreements, a court noted a third-party beneficiary provision that permitted one Jimmy John's franchisee to enforce the agreement with respect to a different franchisee.[92] That strongly indicates that this particular set of noncompete

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87. *See* Conrad v. Jimmy John's Franchise, LLC, No. 18-CV-00133, 2021 WL 718320 (S.D. Ill. Feb. 24, 2021) (noting that the Jimmy John's comprehensive employee noncompete provision was terminated in 2018).

88. Deslandes v. McDonald's USA, LLC, No. 17 C 4857, 2018 WL 3105955 (N.D. Ill. June 25, 2018) (partially sustaining complaint); *see also* Arrington v. Burger King Worldwide, Inc., 448 F. Supp. 3d 1322 (S.D. Fla. 2020), *appeal docketed*, (11th Cir. Sep. 23, 2020) (concluding that franchisor and franchisees were a single firm, so there was no concerted action; court noted that 50 out of 7,226 restaurants were owned by BK; the rest were independently owned with franchise agreements); Blanton v. Domino's Pizza Franchising, LLC, No. 18-13207, 2019 WL 2247731 (E.D. Mich. May 24, 2019) (denying motion to dismiss on claim of a horizontal restraint). For a straightforward evaluation, see Michael Iadevaia, *Poach-No-More: Antitrust Considerations for Intra-Franchise No-Poach Agreements*, 38 ABA J. LAB. & EMP. L. 151 (2020).

89. *See supra* text accompanying note 76.

90. NYNEX Corp. v. Discon, Inc., 525 U.S. 128, 137–40 (1998) (holding that a purely vertical exclusionary agreement is to be addressed under rule of reason).

91. *Fast Food Market Share*, T4 LABS, https://www.t4.ai/industry/fast-food-market-share [https://perma.cc/2YKB-BH5V] (last updated Jan. 23, 2021) (noting that the McDonald's market share was 21.4% of the fast-food restaurant industry in 2018).

92. Butler v. Jimmy John's Franchise, LLC, 331 F. Supp. 3d 786, 793 (S.D. Ill. 2018). Jimmy John's withdrew its noncompete agreement as part of an antitrust settlement with the New York Attorney General. *See* Press Release, New York State Office of the Attorney General, A.G. Shneiderman Announces Settlement with Jimmy John's to Stop Including Non-Compete Agreements in Hiring Packets (June 22, 2016), https://ag.ny.gov/press-release/2016/ag-schneiderman-announces-settlement-jimmy-johns-stop-including-non-compete [https://perma.cc/AS65-JAWU].

agreements was in fact horizontal, for the benefit of the franchisees by enabling them to limit wage competition among themselves.

Here, federal antitrust law acknowledges a theory of "hub-and-spoke" conspiracies, which reaches situations where a central firm (the "hub") communicates individually with the "spokes," but the spokes do not apparently communicate with one another. The law generally requires a central offer from the hub, parallel acceptance by the spokes, and a finding that independent decision-making would have been contrary to each spoke's individual self-interest. That is, each spoke agrees with the hub only because it understands that others are agreeing as well.[93] Whether the theory could be used against franchise-wide noncompete agreements would very likely depend on whether each franchisee agreed only on the understanding that other franchisees were going along. That certainly seems plausible. Why would a franchisee give up its right to hire away a different franchisee's employee unless it assumed that the other franchisees were promising the same thing in return?

The EO encourages the Chair of the FTC, in the Chair's discretion, to work with the rest of the Commission to engage in rulemaking "appropriate and consistent with applicable law," respecting "agreements that may unduly limit workers' ability to change jobs."[94] As noted previously,[95] § 5 of the FTC Act can be used against everything covered by the Sherman Act plus a penumbra of practices that may not fall within the letter of the Sherman Act but are within its spirit.[96] In this case, rulemaking that applies a harsh rule against intra-franchise noncompetes seems well justified, even if the agreements are not formally horizontal. The agreements serve to limit the mobility of employees in a vulnerable, low wage sector and promise very little benefit in return—particularly, as in these cases, when they are applied more-or-less universally to all employees.[97]

Another limit on employee mobility is occupational licensing restrictions, which the EO mentions but does not cover in any detail.[98] This reference is very likely to state-issued licenses thought to be too restrictive. If so, that would almost certainly require preemptive federal legislation and would raise major disputes over federalism and the right of the states to license internal practitioners of various

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93. The classic case is Interstate Circuit v. United States, 306 U.S. 208 (1939). *See also* Toys "R" Us, Inc. v. FTC, 221 F.3d 928 (7th Cir. 2000); 6 PHILLIP E. AREEDA & HERBERT HOVENKAMP, ANTITRUST LAW ¶ 1402c (4th ed. 2018); Barak Orbach, *Hub-and-Spoke Conspiracies*, 15 ANTITRUST SOURCE 1 (Apr. 2016).

94. Exec. Order, *supra* note 1, at 36,992.

95. *See supra* text accompanying notes 1–16.

96. FTC v. Brown Shoe Co., Inc., 384 U.S. 316, 321 (1966) ("This broad power of the Commission is particularly well established with regard to trade practices which conflict with the basic policies of the Sherman and Clayton Acts even though such practices may not actually violate these laws.").

97. *See* Herbert Hovenkamp, *Antitrust and the FTC: Franchise Restraints on Worker Mobility*, PROMARKET (Dec. 1, 2021), https://promarket.org/2021/12/01/antitrust-ftc-franchise-worker-mobility-labor/ [https://perma.cc/Y4V5-CNDR] (arguing that the FTC would be a good enforcer because it might be able to evade the "agreement" requirement in § 1 of the Sherman Act).

98. Exec. Order, *supra* note 1, at 36,992.

occupations. Closely related but more easily reachable under the antitrust laws are "unauthorized practice" rules that are often promulgated by interested professional groups themselves. Here federal antitrust policy has a role, provided that the rules are set by the practitioners themselves and without independent state supervision. For example, in *North Carolina Board of Dental Examiners v. FTC*,[99] a divided (6–3) Supreme Court held that antitrust "state action" immunity did not apply when a state board controlled entirely by practicing dentists and not supervised by any public agency passed and enforced a rule prohibiting teeth whitening by nondentists.[100] The three dissenters (Justices Alito, Scalia, and Thomas) protested that even this was too deep an incursion into state prerogatives to control professional conduct.

What is not clear from the EO is whether the President wishes to go further. The "state action" doctrine, which has a long history,[101] has always been a balancing act of federalism, as the dissent in the *North Carolina Dental* case makes clear. Under it the states are free to engage in as much occupational licensing and restriction of practice as they wish, provided that it is actually the state rather than private parties doing the regulating. For example, if a state wished to license dog walkers it could do so, as long as it clearly stated its intent via appropriate legislation or other action, and that any private decision-making was adequately supervised by an independent government actor. At that point, antitrust policy has nothing further to say and stands aside. Going further might be constitutionally possible, but it would require a different judgment about the division of federal and state regulatory power in an area that for most occupations was traditionally reserved to the states. A few exceptions exist where interstate impact is substantial, such as the granting of airplane pilots' licenses[102] or the numerous types of licenses granted for telecommunications.[103] In any event, federal intrusion more deeply into state control of the professions is not likely to be something that the antitrust enforcement agencies can accomplish on their own, and Congress may not think it desirable.

VI. PATENTS, STANDARD ESSENTIAL PATENTS, AND PRACTICES INVOLVING ANTICOMPETITIVE PATENT AGREEMENTS

One place that a "whole of government" approach to competition policy could go even further than the EO pushes is with patents. Patent law has often taken the exclusionary privilege conferred by patents to extremes, writing as if competition were the enemy to be conquered rather than a body of law that should

99. 574 U.S. 494 (2015).

100. On the "state action" doctrine, *see* PHILLIP E. AREEDA & HERBERT HOVENKAMP, ANTITRUST LAW ¶¶ 221–31 (5th ed. 2021).

101. *See* Parker vs. Brown, 317 U.S. 341 (1943).

102. *See generally Licenses & Certificates*, FED. AVIATION ADMIN., https://www.faa.gov/licenses_certificates/ [https://perma.cc/9YXE-WDPG] (last updated Oct. 14, 2021).

103. *See generally Licensing*, FED. COMMC'N COMM'N, https://www.fcc.gov/licensing (last visited March 28, 2022).

be made to work in tandem with antitrust law.[104] This level of disdain for competition policy is in sharp conflict with the fact that the impact of competition policy is much easier to assess than is the impact of patent policy. As a general matter, patent protection operates as a severe exception to the free movement of resources and ideas, and its coverage should not extend further than the Patent Act expressly authorizes. Beginning with that premise, enforcement authorities can do much good.[105]

In what can only be regarded a serious understatement, the EO asks the Attorney General and the Secretary of Commerce to reconsider the position taken on standard essential patents and Fair Reasonable and Non-Discriminatory ("FRAND") commitments.[106] Consistent with that policy statement, the Antitrust Division parted ways with the FTC and intervened against it in an important case involving exclusionary practices in the market for standard essential patents.[107] The Ninth Circuit's decision, which reversed a well-reasoned and well-supported decision in the Northern District of California,[108] did considerable damage to the usefulness of antitrust to police anticompetitive practices in FRAND patent licensing. For its part, the Department of Justice's ("DOJ") "New Madison" Policy Statement that was put into question by the decision was inconsistent with well-established law on the entitlement to an injunction.[109]

Both the Ninth Circuit's decision and the New Madison statement threaten to undermine highly successful, voluntary arrangements for technology sharing in areas such as cellular phones and autonomous vehicles that produce enormous social benefits but are also quite vulnerable to manipulation, particularly by larger

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104. *E.g.*, Trebro Mfg., Inc. v. Firefly Equip., LLC, 748 F.3d 1159, 1172 (Fed. Cir. 2014); *see* Erik Hovenkamp & Thomas F. Cotter, *Anticompetitive Patent Injunctions*, 100 MINN. L. REV. 871 (2016).

105. *See* Herbert Hovenkamp, *Antitrust and the Patent System: A Reexamination*, 76 OHIO ST. L.J. 467, 475 (2015).

106. That statement is a reference to "Policy Statement on Remedies for Standards-Essential Patents Subject to Voluntary F/RAND Commitments," issued jointly by the Department of Justice, the United States Patent and Trademark Office, and the National Institute of Standards and Technology on December 19, 2019, available at https://www.justice.gov/atr/page/file/1228016/ [https://perma.cc/5QUY-8VZT]. The FTC did not join. The term "FRAND" refers to "Fair Reasonable and Non-Discriminatory" royalties. Sometimes the "F" is dropped to "Rand," yielding the EO's usage of F/RAND. *See* Exec. Order, *supra* note 1, at 36,991.

107. *See* FTC v. Qualcomm, 969 F.3d 974 (9th Cir. 2020).

108. FTC v. Qualcomm, 411 F. Supp. 3d 658 (N.D. Cal. 2019).

109. *See* Herbert Hovenkamp, *Justice Department's New Position on Patents, Standard Setting, and Injunctions*, REG. REV. (Jan. 6, 2020), https://www.theregreview.org/2020/01/06/hovenkamp-justice-department-new-position-patents-standard-setting-injunctions/ [https://perma.cc/U6TZ-F73F] [hereinafter Hovenkamp, *Justice Department's New Position*] (criticizing the Justice Department's policy statement). On the legacy of the Trump-era position, which is apparently already on the outs in the Antitrust Division, see *DOJ Downgrades Delrahim Letter to IEEE on Standard-Essential Patents*, FOSS PATS. (Apr. 16, 2021), http://www.fosspatents.com/2021/04/doj-downgrades-delrahim-letter-to-ieee.html [https://perma.cc/N5TY-JKZE].

participants.[110] Of course, one cannot be sure that the same thing would not have happened if the Antitrust Division had not "switched sides" and decided to speak on behalf of a FRAND violator rather than the FTC. Further, care must still be taken not to breach the line between contract and antitrust. FRAND agreements are voluntary contracts among IP holders, manufacturers and others involved in a common technology, under which they agree to license freely to all other members in exchange for FRAND royalties. The arrangements are fundamentally contractual and not every breach of contract violates the antitrust laws. But neither is contract law a defense, and in the *FTC v. Qualcomm* case the record of Qualcomm's antitrust violations seemed clear enough.[111]

One important thing to understand about FRAND is its inherently private, contractual nature, as well as its ability to pull large numbers of developers into a competitive but networked infrastructure. This makes it an engine with great potential for producing economic growth in networked high-tech markets. It enables both private cooperation and competition in technology development.

Nevertheless, destabilizing temptations such as those that befell Qualcomm are a serious threat. Declaring a patent to be "standard essential," which is a prerequisite to placing it within the FRAND system, makes it worth far more because standard essential patents can be adopted by other firms without worry that they will later be surprised by infringement actions after they have made a significant investment in technology that writes on that standard.[112] The FRAND system addresses this with an important tradeoff: FRAND patents will get adopted into the standard, but with important limitations on the power to exclude that patent law would otherwise grant. First, the FRAND system imposes component level (rather than final product) licensing based on the *ex ante* value of the patent prior to its FRAND declaration—i.e., at a time when it was still in competition with a broader range of alternatives.[113] FRAND then also requires that such patents be licensed to all takers at FRAND rates, without regard to whether the putative licensee is a competitor.

These are simply variations on a principle that is well established in the law-and-economics literature: when a market is structured in such a way that monopoly is likely, we could force firms to bid against one another for the right to occupy that market, with the *ex ante* bid based on the promise of competitive behavior *ex post*.[114] Once a firm has successfully entered the market by making this promise, the higher profits available to incumbents will motivate it to renege on its earlier promise.

110. Herbert Hovenkamp, *FRAND and Antitrust*, 105 CORNELL L. REV. 1683 (2020).

111. *Id.* at 1700–28.

112. *See* Aminta Raffalovich & Steven Schwartz, *Antitrust Analysis of FRAND Licensing Post-FTC v. Qualcomm*, 31 COMPETITION: ANTITRUST & UNFAIR COMPETITION L. 138 (2021); Hovenkamp, *FRAND and Antitrust*, *supra* note 110, at 1728–34.

113. *See* Erik Hovenkamp, *Tying, Exclusivity, and Standard-Essential Patents*, 19 COLUM. SCI. & TECH. L. REV. 79 (2017).

114. Harold Demsetz, *Why Regulate Utilities?*, 11 J.L. & ECON. 55 (1968).

The Trump-era DOJ's New Madison statement effectively permitted firms to do exactly that. Qualcomm flaunted these rules by charging royalties higher than FRAND-determined rates and selectively refusing to license to competitors, in violation of FRAND commitments.[115] The evidence based on market power and exclusion was more than sufficient to support claims of antitrust violations. This was a case that the FTC should not have lost. Hopefully the FTC can write rules for FRAND that will indicate the types of conduct that will trigger FTC actions, and a new DOJ will cooperate. Simple breaches of FRAND agreements are not enough, but when market power and exclusionary effects are present, as they clearly were in *Qualcomm*, antitrust intervention is appropriate. That then leaves the issue to the federal courts, and many judges remain suspicious. That gives the FTC a particularly high burden to justify and clarify its position.

In December 2021, the Antitrust Division responded to some of these concerns. Together with the U.S. Patent and Trademark Office ("USPTO") and the National Institute of Standards and Technology ("NIST"), the Antitrust Division put forward a draft statement on "Licensing Negotiations and Remedies for Standards-Essential Patents" ("Draft Statement").[116] The draft substantially repudiates the New Madison statement as well as another Trump-administration declaration: the same agencies' 2019 statement on remedies for standards essential patents.[117] The Press Release accompanying the 2021 statement indicates that it was drafted in response to President Biden's EO.[118]

The Draft Statement does two things: first, it shifts a strong bias favoring injunctions that was articulated in the 2019 policy statement on remedies back to a perspective that is consistent with equitable principles generally. Under the Draft Statement, entitlement to a patent infringement injunction is not automatic but rather should be guided by the historical principles that the Supreme Court returned to in its *eBay* decision.[119] A firm that has subjected its patents to FRAND requirements has already promised to license its patents to other participants in a nondiscriminatory fashion. The adequacy of its remedy at law (royalties in this case) must be determined within that framework. That leaves only a narrow window for

115. FTC v. Qualcomm, 969 F.3d 974, 983–86 (9th Cir. 2020).

116. U.S. PAT. & TRADEMARK OFF., NAT'L INST. OF STANDARDS & TECH., & U.S. DEP'T OF JUST., DRAFT POLICY STATEMENT ON LICENSING NEGOTIATIONS AND REMEDIES FOR STANDARDS-ESSENTIAL PATENTS SUBJECT TO VOLUNTARY F/RAND COMMITMENTS (2021), https://www.justice.gov/atr/guidelines-and-policy-statements-0/public-comments-draft-policy-statement-licensing-negotiations-and-remedies-standards-essential [https://perma.cc/A2PE-9BWH] [hereinafter DRAFT POLICY STATEMENT ON LICENSING NEGOTIATIONS].

117. *See* U.S. PAT. & TRADEMARK OFF., NAT'L INST. OF STANDARDS & TECH., & U.S. DEP'T OF JUST., POLICY STATEMENT ON REMEDIES FOR STANDARDS-ESSENTIAL PATENTS SUBJECT TO VOLUNTARY F/RAND COMMITMENTS (2019). For my critique of this statement, see Hovenkamp, *Justice Department's New Position*, *supra* note 109.

118. *See* Press Release, U.S. Dep't of Just., Off. of Pub. Affairs, Public Comments Welcome on Draft Policy Statement on Licensing Negotiations and Remedies for Standards-Essential Patents Subject to F/RAND Commitments (Dec. 6, 2021), https://www.justice.gov/opa/pr/public-comments-welcome-draft-policy-statement-licensing-negotiations-and-remedies-standards [https://perma.cc/L6XR-8HAC].

119. eBay, Inc. v. MercExchange, LLC, 547 U.S. 388 (2006).

injunctions, as the Draft Statement notes[120]—mainly against firms that are violating clearly established obligations under the FRAND system. Until that violation has been established, no injunction should be forthcoming. Further, a patent holder who is in violation of its FRAND obligations has "unclean hands," in the language of equity, and would be denied an injunction. That would be the case of a firm that has made an enforceable commitment to license a patent under certain conditions and then violated that commitment.[121]

Second, on the merits, the Draft Statement seeks to restore FRAND patent licensing to the same position as licensing generally—that is, subject to antitrust rules when they are violated.[122] This does not mean that an antitrust action should lie for breach of a FRAND agreement; it does entail, however, that when market power and anticompetitive effects are present, the existence of a FRAND agreement is not a bar to antitrust enforcement. For the most part, the statement stays out of interpretative problems that do not implicate the antitrust laws, such as what the royalty base should be when it is not specified. It does at one point suggest that the FRAND commitment might do better to include more specific information about the offered terms.[123] This position responds to a critique that FRAND commitments can be difficult to interpret, and this can complicate the determination of a violation supporting an injunction.[124] It is also consistent with Harold Demsetz's proposal that bidders for the right to sell in monopolized markets announce their prices in advance.[125] Speaking with possible reference to the *Qualcomm* decision, the statement observes that:

> Opportunistic conduct by SEP holders to obtain, through the threat of exclusion, higher compensation for SEPs than they would have been able to negotiate prior to standardization, can deter investment in and delay introduction of standardized

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120. DRAFT POLICY STATEMENT ON LICENSING NEGOTIATIONS, *supra* note 116, at 8–9 (citing Apple, Inc. v. Motorola, Inc., 757 F.3d 1286 (Fed. Cir. 2014)).

121. *See* Hovenkamp, *Justice Department's New Position*, *supra* note 109.

122. On these requirements, see Hovenkamp, *Antitrust and the Patent System*, *supra* note 105.

123. See DRAFT POLICY STATEMENT ON LICENSING NEGOTIATIONS, *supra* note 116, at 5 n.8, which states:

> Providing additional information with the licensing offer that allows a potential licensee to evaluate for each SEP whether (1) a license is needed and (2) the offer is F/RAND can facilitate the progression of negotiations and enable the timely conclusion of a F/RAND license. This may be particularly helpful to small entities that do not have the expertise or resources to fully address SEP issues and may lack access to information from which to draw assurance that proposed terms are F/RAND.

124. *See* Case C-170/13, Huawei Techs Co. v. ZTE Corp., 2015 E.C.R 477 (responding to these concerns under EU law); *see also* A. Douglas Melamed & Carl Shapiro, *How Antitrust Law Can Make Frand Commitments More Effective*, 127 YALE L.J. 2110, 2115, 2121–22 (2018); William F. Lee & Douglas Melamed, *Breaking the Vicious Cycle of Patent Damages*, 101 CORNELL L. REV. 385, 430–31 (2016).

125. *See* Demsetz, *supra* note 114, at 56 (stating "the rival who offers buyers the most favorable terms will obtain their patronage," whether or not they share production).

> products, raise prices, and ultimately harm consumers and small businesses.[126]

The EO also unfortunately states its concerns about patent abuses too narrowly by seeking to "avoid the potential for anticompetitive extension of market power beyond the scope of granted patents."[127] That is certainly a problem, but by relying on this ancient "beyond the scope of the patent"[128] formulation, the EO overlooks the potential for anticompetitive abuse that can arise *within* the scope of a patent. Pay-for-delay itself is an example. The question in a pay-for-delay case is not whether the conduct—a settlement of patent infringement litigation—lies outside the scope of the patent. Rather, the practice results from serious doubts that the patent itself is any good to begin with. For that reason, it was the anti-enforcement *dissenters* in *FTC v. Actavis* who argued in favor of the "scope of the patent" test.[129] In most of the cases that condemned anticompetitive conduct for being "beyond the scope" of the patent, the patent itself was presumed to be valid. Rather, the defendant was asserting some kind of right to exclude, such as the tying of unpatented goods that the patent did not protect.[130]

The same thing is true of anticompetitive patent acquisitions and much of the activities of patent assertion entities ("PAEs") in acquiring and aggregating large numbers of patents from outside inventors. In most of these cases the problem is not that the defendant is acting beyond the scope of the patent, but that the patents themselves are either invalid or the activities, such as post-issuance acquisitions, are not protected by the Patent Act at all.[131] For these, stronger guidance from the FTC would be a good idea.

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126. DRAFT POLICY STATEMENT ON LICENSING NEGOTIATIONS, *supra* note 116, at 4. However, the statement also acknowledges the offsetting concern:

> At the same time, when standards implementers are unwilling to accept a F/RAND license or delay licensing negotiations in bad faith, these strategies can lessen patent holders' incentives to participate in the development process or contribute technologies to standards voluntarily. Without adequate incentives to contribute to a consensus-based process, patent holders may opt for closed, proprietary standards that do not offer the same benefits of interoperability and enhanced consumer choice.

127. Exec. Order, *supra* note 1, at 36,991.

128. *E.g.*, Coupe v. Royer, 155 U.S. 565, 576 (1895) ("[T]he courts have no right to enlarge a patent beyond the scope of its claim . . . ."); *see* Herbert Hovenkamp, *The Rule of Reason and the Scope of the Patent*, 52 SAN DIEGO L. REV. 515 (2015).

129. FTC v. Actavis, Inc., 570 U.S. 136, 162, 167 (2013) (Roberts, C.J., dissenting) (noting that under the "scope of the patent" test the pay for delay settlement would not violate the antitrust laws); *see also* Impax Laboratories, Inc. v. FTC, 994 F.3d 484 (5th Cir. 2021) (mentioning no scope of the patent test in a recent FTC vistory in a pay-for-delay case).

130. *E.g.*, Motion Picture Pats. Co. v Universal Film Mfg. Co., 243 U.S. 502, 517 (1917) (tying of patented film projector to unpatented films was attempt to create a monopoly "wholly without the scope of the patent").

131. *See, e.g.*, Intellectual Ventures I, LLC v. Capital One Fin. Corp., 280 F. Supp. 3d 691 (D. Md. 2017) (noting the defendant's practice of buying up all patents by outside inventors relating to an area of technology and then using them to extract royalties from unknowing infringers was not unlawful where at least some of the patents were valid; further, observing that the enforcement fell within the scope of the patents).

Aggregations of issued patents by nonpracticing entities who bring them simply to file infringement suits actually have at least a partial remedy in existing law. Section 7 of the Clayton Act,[132] the merger provision, prohibits anticompetitive assets as well as stock acquisitions, and a patent is clearly an "asset" for this purpose.[133] While patents are transferable assets, patent acquisitions can become unlawful mergers when they threaten competition, and patent validity is not a defense.[134] While a patent itself creates a right to exclude, it does not create the right to create a monopoly after the patent has been issued. This is a simple principle that derives from the difference between a property right and an economic monopoly. For example, ownership of a factory gives its owner the power to exclude trespassers, but that does not protect the parties when the sale of the factory becomes an unlawful merger. Any revision of the merger guidelines to cover exclusionary practices[135] should provide guidance on these patent aggregation practices.

The EO also invites the FTC to engage in rulemaking with respect to pay-for-delay pharmaceutical settlements.[136] In its *Actavis* decision in 2013 the Supreme Court held that pay-for-delay pharmaceutical settlements are reachable under the antitrust laws.[137] Briefly, the Hatch–Waxman Act grants a 180-day period of exclusivity, kind of a short second patent, to the first generic to come into the market upon the expiration of a primary patent on a particular drug.[138] This system has become heavily gamed. While initial drug patents, particularly those on molecules, are usually very strong, the drug companies have developed a variety of ways to patent lookalike products that serve the same market need as the pioneer drug. These patents, in contrast to the pioneer patents, are notoriously weak and have a high invalidity rate.[139]

The simplest variation of the pay-for-delay practice is that a generic drug maker files its intent to enter the market when the primary patent expires. The owner of that patent then files an infringement suit on the weak follow-on patent—a suit that the patentee would be likely to lose on grounds of invalidity. At that time, however, the pioneer patentee pays the generic a very large sum, often in the hundreds of millions of dollars, to delay its entry for several years. Under the Hatch–Waxman Act, no other generic can enter during that time either. The effect of this "reverse payment" settlement—that is, from the patentee to the alleged infringer, rather than the other way around—is to extend the primary drug's period of exclusivity, often for several years. The more important result is that the settlement serves to preserve the drug's price at the high level it obtained during the period of

132. 15 U.S.C. § 18.

133. *See* 5 PHILLIP E. AREEDA & HERBERT HOVENKAMP, ANTITRUST LAW ¶ 1202f (5th ed. 2021).

134. *See* Erik Hovenkamp & Herbert Hovenkamp, *Buying Monopoly: Antitrust Limits on Damages for Externally Acquired Patents*, 25 TEX. INTELL. PROP. L.J. 39 (2017).

135. *See supra* text accompanying note 129.

136. Exec. Order, *supra* note 1, at 36,997.

137. FTC v. Actavis, Inc., 570 U.S. 136, 159–60 (2013).

138. 21 U.S.C.A. § 355(j)(5)(B)(iv).

139. *See* Hovenkamp, *Rule of Reason*, *supra* note 128, at 547.

the pioneer patent.[140] This was one of those cases where the dissenters gave voice to a "consumer welfare" standard for antitrust while approving a practice that unambiguously increased consumer prices, often by hundreds of millions of dollars.[141]

Justice Breyer's *Actavis* opinion for the majority found a basis for illegality but also held that, given offsetting considerations due to the patents, the rule of reason should be applied.[142] That meant that the practice entered the rule-of-reason labyrinth which, under current law, is subject to a severe anti-enforcement bias.[143] The result is very costly litigation. On top of that, causation and damages requirements are heroic, making it exceedingly difficult for private plaintiffs to win cases.

A better approach would be a much harsher substantive rule—close to per se illegality, but with allowance for reasonably anticipated litigation costs (roughly $5 million).[144] A patentee still has a right to defend a patent reasonably believed to be valid and also to settle rather than confront the cost and uncertainties of litigation. When reverse payment settlements in the Hatch–Waxman setting reach into the hundreds of millions of dollars, however, it is pretty clear that the parties are not disputing over a patent presumed to be valid. Rather they are gaming the system so as to divide rents from a practice that uses that Act precisely in the opposite way from intended, which was to facilitate the prompt entry of generic drugs.[145]

A recently passed California statute excluding pay-for-delay settlements is a good model for Congress to examine. That statute prohibits a generic from receiving "anything of value" in exchange for an agreement to delay research, development, or marketing of a generic drug.[146] At this writing a federal court has issued a preliminary injunction against enforcement of the statute, largely on Commerce Clause grounds because the statute applies to out-of-state settlements.[147] Federal legislation taking the same approach would not confront that issue.

Finally, the EO contains statements directed mainly to the Secretary of Health and Human Services addressing practices that unreasonably delay the competitive introduction and production of biosimilar drugs, as well as outside

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140. *See* Aaron Edlin et al., *The Actavis Inference: Theory and Practice*, 67 RUTGERS UNIV. L. REV. 585 (2015).

141. *Actavis, Inc.*, 570 U.S. at 161 (Roberts, C.J., dissenting, joined by Justices Scalia and Thomas).

142. *Id.* at 159.

143. *See supra* text accompanying notes 5–6.

144. *See* Jongsub Lee, Seungjoon Oh & Paula Suh, *Inter-Firm Patent Litigation and Innovation Competition* (Working Paper, 2021), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3298557 [https://perma.cc/THR3-63JH] (describing median of all patent litigation through trial; could be larger for valuable patents).

145. S*ee* Erik Hovenkamp, *Antitrust Law and Patent Settlement Design*, 32 HARV. J.L. & TECH. 417 (2019) (stating the relevant conditions for such rules); Impax Labs., Inc. v. FTC, 994 F.3d 484 (5th Cir. 2021) (noting that even under the rule of reason, a settlement that did not provide for a delay would be a less restrictive alternative).

146. CAL. HEALTH & SAFETY CODE § 134002(a)(1).

147. Ass'n for Accessible Meds. v. Bonta, No. 2:20-cv-01708-TLN-DB, 2021 WL 5853431, at *9–10 (E.D. Cal. Dec. 9, 2021).

producer access to drug products for purposes of litigation.[148] A biosimilar drug is a distinguishable compound from the original, but one that has no clinically meaningful differences in terms of safety and effectiveness.[149] One particularly pernicious abuse of the patent process is a pioneer drug maker's acquisition of patents on similar drugs to its own products. The firm does not practice these patents, but holds them to make sure that no outside firm can innovate a similar competitor.[150] At present there is some antitrust litigation involving firms who delay the entry of biosimilars by acquiring the relevant patent preemptively.[151] Other claims are of anticompetitive bundled discounts that tie packages or cocktails of drugs together, effectively excluding a biosimilar competitor.[152] There is also litigation, not exclusively under the antitrust laws, involving agreements with insurers that restrict payment for use of biosimilars.[153]

For much of patent and antitrust litigation the FTC has a distinctive advantage over private plaintiffs. Acting as an enforcer, the FTC need not prove causation or damages, but only the violation itself. A private plaintiff needs to prove both.[154] This is particularly important in innovation-intensive areas because the requirement that private plaintiffs prove causation and damages—both essential statutory features of private claims—requires them to establish "but for" situations that are extremely difficult to establish in complex markets where the effects of innovation are an important element.[155]

VII. RIGHT TO REPAIR

The issue of a right to repair one's own durable equipment, or alternatively to choose one's own repair technician, sounds somewhat removed from antitrust,

148. Exec. Order, *supra* note 1, at 36,997.

149. *See* Michael A. Carrier & Carl J. Minniti III, *Biologics: The New Antitrust Frontier*, 2018 UNIV. ILL. L. REV. 1.

150. *See* Gregory R. Day & W. Michael Schuster, *Patent Inequality*, 71 ALA. L. REV. 115, 121–30 (2019); Peter Loftus & Denise Roland, *By Adding Patents, Drugmaker Keeps Cheaper Humira Copies Out of U.S.*, WALL ST. J. (Oct. 16, 2018), https://www.wsj.com/articles/biosimilar-humira-goes-on-sale-in-europe-widening-gap-with-u-s-1539687603?ns=prod/accounts-wsj [https://perma.cc/7MWX-RTFH].

151. *E.g.*, *In re* Humira Antitrust Litig., 465 F. Supp. 3d 811 (N.D. Ill. 2020), *appeal docketed*, (7th Cir. July 30, 2020) (noting the *Noerr-Pennington* doctrine precluded antitrust liability where roughly half of the patents that the defendant asserted were found to be valid); *cf.* Biocad JSC v. Hoffman-La Roche, 942 F.3d 88 (2d Cir. 2019) (finding that foreign manufacturers failed to show that their claim that defendant's scheme to exclude biosimilar drugs fell within exclusion of the Foreign Trade Antitrust Improvements Act, 15 U.S.C. § 6a, given that in the first instance the injuries accrued entirely to foreign firms). The problem of antitrust and new entry by biosimilars is treated in HERBERT HOVENKAMP, MARK D. JANIS, MARK A. LEMLEY, CHRISTOPHER LESLIE & MICHAEL CARRIER, IP AND ANTITRUST: AN ANALYSIS OF ANTITRUST PRINCIPLES APPLIED TO INTELLECTUAL PROPERTY LAW (3d ed. 2017 & 2021 Supp.).

152. Pfizer, Inc. v. Johnson & Johnson, 333 F. Supp. 3d 494 (E.D. Pa. 2018) (denying motion to dismiss bundled discount claim).

153. *See In re* Remicade Antitrust Litig., 345 F. Supp. 3d 566 (E.D. Pa. 2018).

154. For a good examination, see Kevin B. Soter, *Causation in Reverse Payment Antitrust Claims*, 70 STAN. L. REV. 1295 (2018).

155. *See* Hovenkamp, *Antitrust Harm*, *supra* note 5, at 842–45.

and much of it is. In fact, however, the right to select one's own repair service was the subject of a controversial Supreme Court antitrust decision in 1992.[156] The Court held that a nondominant firm's restraints on third-party repairs of its photocopiers was actionable when the owner of the photocopier was "locked in" by virtue of its purchase. After remand, the plaintiffs won a significant victory at trial.[157] As a result, a type of antitrust right to repair still has some vitality under the Sherman Act, particularly if the restraint imposed by the manufacturer can be characterized as a tying arrangement.[158]

The right to repair can also raise issues under patent law—in particular, patent law's ancient distinction between "repair" and "reconstruction."[159] Under the Patent Act, the purchaser–user of a patented good has a right to "repair" it, but "reconstructing" it while it is still under patent is an act of infringement. The Supreme Court has generally interpreted this law in a way that is favorable to accused infringers. For example, in its fractured plurality decision in *Aro Manufacturing Co. v. Convertible Top Replacement Co.*,[160] the Court held that an independent firm could lawfully replace the entire canvas top of a traditional "ragtop" convertible automobile, leaving only the metal supports as original. As is so often the case, the patented good contained some parts that are either single-use or else that wear out more quickly than other parts. Relying on that decision, the Federal Circuit held in *Jazz Photo Corp. v. ITC*[161] that firms who completely refurbished disposable cameras that were intended for a single use were conducting a permissible "repair" and not a "reconstruction." This right by the purchaser to rebuild is also strongly reflected in the patent "exhaustion" doctrine, which holds that the purchase of a patented article exhausts all of the patentee rights in that article, leaving the owner free to repair it. For example, once a printer maker sells a patented toner cartridge it cannot enforce by patent law a restriction prohibiting users from refilling it and replacing worn parts as needed.[162] Patent exhaustion is not an antitrust doctrine, but it is often applied in such a way as to reach the same vertical practices that antitrust law reaches.[163]

Looking only at products that are sold, the right of the purchaser to make her own repairs appears to be strongly embedded in American law. Indeed, the patent exhaustion doctrine stated as much since the beginning of the twentieth

156. Eastman Kodak Co. v. Image Tech. Servs., Inc., 504 U.S. 451 (1992).

157. Largely affirmed by 125 F.3d 1195 (9th Cir. 1997).

158. The decision was widely criticized, including by this Author. *See* HOVENKAMP, FEDERAL ANTITRUST POLICY, *supra* note 30, § 3.3a.

159. *See* Natali Richter, *"Substantial Embodiments" and "Readily Replaceable Parts": A Contemporary Understanding of the Doctrine of Permissible Repair*, 59 UNIV. LOUISVILLE L. REV. 333, 335 (2021) (summarizing many doctrine developments to date).

160. 365 U.S. 336 (1961), subsequently qualified in 377 U.S. 476 (1964).

161. 264 F.3d 1094 (Fed. Cir. 2001).

162. Impression Prods., Inc. v. Lexmark Int'l, Inc., 137 S. Ct. 1523 (2017).

163. The practice is most frequently analogized to tying. *See* 10 PHILLIP E. AREEDA & HERBERT HOVENKAMP, ANTITRUST LAW ¶ 1782 (4th ed. 2018).

century[164] and even tilted toward expansive permission of repairs prior to the Civil War.[165]

Two important variations can provoke serious problems, however. One is when the aftermarket part is itself patented, and the other is when essential diagnostic or repair tools include software, which is licensed rather than sold.

Suppose a particular patented electronic part in a cellular phone fails and must be replaced. Here, the Patent Act provides that a patentee has no duty to license a patent to someone else, and this entails that a manufacturer of the patented part has no duty to sell it.[166] In that case, under current law, the owner of the phone may be stuck: she can obtain the part only from the manufacturer–patentee, who may insist on installing it as well. That could be a tie of parts and service, which under some circumstances could be unlawful under the antitrust laws.[167]

A related variation occurs when the replacement part bears design features that are covered by a design patent. This issue has arisen in the market for aftermarket "crash" parts for automobiles and could threaten the enterprise of making and selling non-OEM (Original Equipment Manufacturer) parts. In *Automotive Body Parts Assn. v. Ford Global Tech, LLC*, the Federal Circuit held that an automobile manufacturer could lawfully enforce design patents on aftermarket parts such as bumpers.[168] The result can prevent third parties from manufacturing replacement parts for automobiles—or practically anything else—if the replacement part has a visible, nonfunctional design component protected by a patent. For example, an independent manufacturer could not produce an exact copy of an aftermarket automobile bumper but would have to make its appearance sufficiently different that it did not infringe the design patent. This decision could effectively wipe out a large portion of the market for third-party design of aftermarket parts. Insurers often prefer third-party parts because they are less expansive. By contrast, car owners presumably prefer cars whose replacement parts are identical to the originals. Design patents are supposed to cover nonfunctional

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164. Goodyear Shoe Mach. Co. v. Jackson, 112 F. 146, 150 (1st Cir. 1901) (finding permissible repair rather than reconstruction when purchasers of heavy-duty sewing machines used for making shoes replaced the machines' worn-out cams); Morrin v. Robert White Eng'g Works, 138 F. 68, 77 (C.C.E.D.N.Y. 1905) (holding that part replacement constituted a repair rather than reconstruction when consumption of the replaced part is an essential element of the device).

165. Wilson v. Simpson, 50 U.S. 109 (1850) (noting that "repairing" is permissible, but not "replacing;" here, purchaser of patented wood-planing machine had right to replace the blades, or cutters, which wore out frequently). On the history prior to the Sherman Act, see Herbert Hovenkamp, *Antitrust and the Design of Production*, 103 CORNELL L. REV. 1155 (2018).

166. 35 U.S.C. § 271(d)(4). The *Kodak* case got around the problem by reasoning that the provision merely codified existing law, although that did not explain why the court could impose a duty that neither the statute nor pre-existing common law would have recognized. Image Tech. Servs., Inc. v. Eastman Kodak Co., 125 F.3d 1195, 1214 n.7 (9th Cir. 1997).

167. See discussion of *Kodak v. Image Technical Services*, *supra* note 155–157.

168. Automotive Body Parts Ass'n v. Ford Global Techs., LLC, 930 F.3d 1314 (Fed. Cir. 2019).

features, which is an important distinction with utility patents. In the past, the Federal Circuit had been more sensitive to this problem—holding, for example, that a design patent on a key blade could not be enforced if its principal purpose was to make the key blade incompatible with locks made by others.[169] This issue could be addressed by advocacy to the Federal Circuit, where most of these cases land on appeal, or else to the Supreme Court. Otherwise, new legislation may be needed to broaden the design patent statute's exclusion of functional content. In fact, the Federal Circuit has been backsliding on the issue, offering protection to designs that have a substantial functional component. This slippage needs to be reversed.[170]

The other situation arises when the repair in question requires access to diagnostic software that is licensed subject to restrictions that effectively prohibit diagnostic use by third parties, including even the owner of the device. For example, John Deere has used such clauses in software licenses for some of its tractors.[171] As a general matter, the first sale doctrine does not apply because software is licensed, not sold. Two doctrines that could be applied, however, are copyright misuse and fair use.

Copyright "misuse" occurs when the owner of a copyright places restrictions that are thought to impair competition unreasonably, even though they might not be antitrust violations.[172] For example, in *Lasercomb America, Inc. v. Reynolds*,[173] the Fourth Circuit found copyright misuse in a software license for a computer-assisted design package that prevented the licensee from designing any competing software. While that agreement very likely did not violate the antitrust laws, it did impose an anticompetitive restraint on the use of the software product at issue. Or in *Assessment Technologies, LLC v. WIREdata, Inc.*[174] Judge Richard Posner—who never read misuse law expansively[175]—struck down as "akin to misuse" the attempt by an owner of a copyrighted database to use it in such a way as to restrict unreasonable access to uncopyrightable data contained in the database. In this case the database was designed to store property tax data, and tax assessors used it to collect this data, which was in the public domain. As a result, the only way to access the tax data was by using the database, which the owner denied.

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169. Best Lock Corp. v. Ilco Unican Corp., 94 F.3d 1563 (Fed. Cir. 1996).

170. For a good discussion of the Federal Circuit's gradual slippage on this issue, see Peter S. Menell & Ella Pardon-Corren, *Design Patent Law's Identify Crisis*, BERKELEY TECH. L.J. (forthcoming 2022), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3668032 [https://perma.cc/D23D-N23H]

171. For a good survey of the issues, including discussion of John Deere's restriction on tractor repairs, see Nicholar A. Mirr, *Defending the Right to Repair: An Argument for Federal Legislation Guaranteeing the Right to Repair*, 105 IOWA L. REV. 2193 (2020).

172. *See* Kathryn Judge, *Rethinking Copyright Misuse*, 57 STAN. L. REV. 901, 905–14 (describing the history of copyright misuse).

173. 911 F.2d 970 (4th Cir. 1990).

174. 350 F.3d 640, 647 (7th Cir. 2003). For additional analysis of the problem, see CHRISTINA BOHANNAN & HERBERT HOVENKAMP, CREATION WITHOUT RESTRAINT: PROMOTING LIBERTY AND RIVALRY IN INNOVATION 265–68 (2013).

175. *E.g.*, USM Corp. v. SPS Techs., Inc., 694 F.2d 505, 510–12 (9th Cir. 1982).

The *WIREdata* case seems quite relevant to the John Deere situation. The farmer in question, or her service provider, wants access to the software not to make pirated copies but only to read it in order to diagnose the tractor that the farmer already owns.

An alternative to the same result is the doctrine of fair use, recently expanded by the Supreme Court in *Google, LLC v. Oracle America, Inc.*[176] That decision found fair use in Google's copying of application programming interface code in an Oracle software. In the right to repair situation, by contrast, the service provider or owner of the device seeks to use it only to make a repair.

The FTC has already addressed some of these issues in a report on the right to repair, issued in May 2021.[177] That report recommends new legislation, which may be necessary for many situations. The discussion here simply observes that existing antitrust and IP law already address at least a part of the problem.

VIII. AGRICULTURE: PACKERS AND STOCKYARD ACT (PSA) AND AGRICULTURAL SEED

The EO instructs the Secretary of Agriculture to consider practices in agricultural markets and ways to improve enforcement of the Packers and Stockyards Act ("PSA").[178] That Statute, which is not part of the antitrust laws, is enforced by the Secretary of Agriculture, although delinquent penalties may be recovered by the Attorney General.[179] Under a related statute, a private person who is injured by a violation of the PSA or certain related orders of the Secretary of Agriculture may obtain single damages. Further, the PSA expressly provides that an injured plaintiff may also sue under state law.[180] In addition, the Secretary may act upon the complaint of a private plaintiff or a state.[181]

The Statute prohibits unfair and deceptive practices as well as practices such as manipulating or controlling prices or giving "undue preferences" for some participants over other. The Statute's broad and vague language led Chief Justice Taft to describe the Act in 1922 as treating U.S stockyards like "great national public utilities."[182] More recently, the courts have responded to this statutory breadth by

176. 141 S. Ct. 1183 (2021); *see also* Chamberlain Grp. v. Skylink Techs., 381 F.3d 1178 (Fed. Cir. 2004) (explaining that neither the Copyright Act nor the Digital Millennium Copyright Act prohibited a competitor from simply reading the plaintiff's code in order to make a compatible garage door opener).

177. FED. TRADE COMM'N, NIXING THE FIX: AN FTC REPORT TO CONGRESS ON REPAIR RESTRICTION (2021), https://www.ftc.gov/system/files/documents/reports/nixing-fix-ftc-report-congress-repair-restrictions/nixing_the_fix_report_final_5521_630pm-508_002.pdf [https://perma.cc/6LVM-MZ8P].

178. Exec. Order, *supra* note 1, at 36,992–93.

179. 7 U.S.C. §§ 192, 213, 215–16. For coverage under the statute, see § 3A PHILLIP E. AREEDA & HERBERT HOVENKAMP, ANTITRUST LAW ¶ 363 (5th ed. 2021). *See also* Herbert Hovenkamp, *Does the Packers and Stockyards Act Require Antitrust Harm?* (Jan. 10, 2011) (unpublished manuscript), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1737440 [https://perma.cc/4CHC-XUVK].

180. 7 U.S.C. § 209.

181. *Id.* § 210.

182. Stafford v. Wallace, 258 U.S. 495, 516 (1922).

reading into it both market power and competitive harm requirements akin to those contained in the antitrust laws.[183] Many of the covered practices resemble business torts more than antitrust violations, and the Statute was drafted so as to treat them that way. In *Terry v. Tyson Farms, Inc.*,[184] however, the court decided that Tyson's alleged practice of under weighing chickens presented to it by contract growers did not violate the Statute because it did not cause injury to competition.[185] But the deceptive practices provision in the Statute contains no competitive injury requirement.

Decisions such as *Terry* are incorrectly reading antitrust-like competitive harm requirements into the PSA. The first two subsections of the Statute contain no market power or competitive injury requirement at all.[186] The subsequent three sections do contain a competitive harm requirement.[187] Clearly it is inconsistent with the language of the Statute to read the competitive harm provisions into the first two subsections. The *Terry* action was under the first subsection. As a result, this concern of the EO is clearly supported by the existing Statute without amendment. If the Statute is opened up to become more tort-like in its approach, the amount of

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183. *E.g.*, *In re* Pilgrim's Pride Corp., 728 F.3d 457 (5th Cir. 2013) (reading statute narrowly to as to impose competitive harm requirements analogous to those created by the Sherman Act.).

184. 604 F.3d 272 (6th Cir. 2010).

185. *Id.* at 276.

186. Substantive violations are enumerated in 7 U.S.C. § 192:

> It shall be unlawful for any packer or swine contractor with respect to livestock, meats, meat food products, or livestock products in unmanufactured form, or for any live poultry dealer with respect to live poultry, to:
>
> (a) Engage in or use any unfair, unjustly discriminatory, or deceptive practice or device; or
>
> (b) Make or give any undue or unreasonable preference or advantage to any particular person or locality in any respect, or subject any particular person or locality to any undue or unreasonable prejudice or disadvantage in any respect; or . . . .

187. Detailed below:

> (c) Sell or otherwise transfer to or for any other packer, swine contractor, or any live poultry dealer, or buy or otherwise receive from or for any other packer, swine contractor, or any live poultry dealer, any article for the purpose or with the effect of apportioning the supply between any such persons, *if such apportionment has the tendency or effect of restraining commerce or of creating a monopoly*; or
>
> (d) Sell or otherwise transfer to or for any other person, or buy or otherwise receive from or for any other person, any article for the purpose or *with the effect of manipulating or controlling prices, or of creating a monopoly in the acquisition of, buying, selling, or dealing in, any article, or of restraining commerce*; or
>
> (e) Engage in any course of business or do any act for the purpose or *with the effect of manipulating or controlling prices, or of creating a monopoly in the acquisition of, buying, selling, or dealing in, any article, or of restraining commerce*; . . .

Id. (emphasis added).

litigation will certainly increase, effectively expanding the reach of federal law into agricultural business torts.

Finally, the EO briefly refers to ensuring that the intellectual property system does not unnecessarily reduce competition in seed "beyond that reasonably contemplated by the Patent Act"[188] and also by the Plant Variety Protection Act of 1970.[189] This could be read as at least an implicit invitation to revisit the Supreme Court's unreasonably narrow decision in *Bowman v. Monsanto*,[190] which held that a farmer–licensee committed patent infringement when he saved some seed from the previous year's crop and replanted it.[191] One thing worth studying is the decision's impact on the competitiveness of the market for agricultural seed. The patent exhaustion doctrine has always served to limit the extent of downstream monopoly of durable products. Granted, "self-replicating" is not precisely the same thing as "durable." Bowman was not re-using the same seed but rather planting its offspring. Nevertheless, the two situations present similar economic issues and equivalent dangers of overreaching.

CONCLUSION

President Biden's efforts to restore the American economy have pointed consistently in one direction—getting economic output up. High output benefits consumers with lower prices. It benefits labor and other suppliers with increased work opportunities and greater competitiveness in job markets, and it benefits business overall as well.

The goal of the antitrust laws is also to promote maximum sustainable output in the individual markets where antitrust claims are addressed. Antitrust should not be a device for punishing firms or for making them less productive just in order to satisfy some noneconomic goal. Nor should it protect one economic group such as small business at the expense of others, such as consumers and labor. One feature of an output-driven approach is that it can be quite tolerant of large firms, provided that they do not behave anticompetitively. Sometimes it is tempting to look back nostalgically at the age of Brandeis and admire the protection of small firms from the incursions of chain stores and organized distribution. But that movement failed miserably—as it should have, for the simple reason that customers did not prefer it. By contrast, anticompetitive practices need to be carefully investigated, prosecuted where appropriate, and enjoined. That is where antitrust policy can create the most widely distributed benefits.

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188. 35 U.S.C.
189. 7 U.S.C. §§ 2321–582.
190. 569 U.S. 278 (2013).
191. *Id.* at 284–85.

THE ROBERTS COURT'S STRUCTURAL INCREMENTALISM

*Kristin E. Hickman**

Too often, Supreme Court opinions raise more questions than they answer. Those of us who painstakingly parse the Justices' writings for insights often lament the explanations not offered. It would be so helpful if the Court's opinions were more like law review articles, exhaustively articulating all the alternative lines of reasoning, surveying the counterarguments, justifying the superiority of the analytical path chosen, and perhaps throwing in a literature review as a bonus (thus giving bragging rights to the law professors whose work was cited). Sometimes we get those opinions, and then we criticize the shortfalls of their reasoning as well, and we complain about how longwinded the Justices have become.[1]

Professor Mila Sohoni is thorough and insightful in analyzing the limitations of and omissions from the reasoning in her titular "Quartet" of 2021–2022 Supreme Court decisions that advance the major questions doctrine as a limitation on the actions federal government agencies may take to resolve contemporary problems: *Alabama Ass'n of Realtors v. Department of Health & Human Services*,[2] *National Federation of Independent Businesses v. Department of Labor*,[3] *Biden v. Missouri*,[4] and *West Virginia v. EPA*.[5] Sohoni carefully traces the precedents from which the major questions doctrine emerged and its arguable evolution from *Chevron* deference exception to independent canon of statutory construction.[6] She notes potential tensions with textualism and with other Court precedents presented by the new major questions canon.[7]

* McKnight Presidential Professor in Law, Distinguished McKnight University Professor, and Harlan Albert Rogers Professor in Law, University of Minnesota Law School. I want to thank Jonathan Adler, Nick Bednar, Betz Bentley, Emily Bremer, Dick Pierce, Mila Sohoni, and Chris Walker for helpful comments and conversations and the student editors at the *Harvard Law Review* for their patience, professionalism, and hard work.

[1] A robust scholarly literature debates the length, content, and claimed failings of contemporary Supreme Court opinions. For just a few examples, see Luke Burton, *Less Is More: One Law Clerk's Case Against Lengthy Judicial Opinions*, 21 J. APP. PRAC. & PROCESS 105 (2021); Erwin Chemerinsky, Speech, *A Failure to Communicate*, 2012 BYU L. REV. 1705; Frederick Schauer, *Opinions as Rules*, 62 U. CHI. L. REV. 1455 (1995); and Daniel A. Farber, *Missing the "Play of Intelligence,"* 36 WM. & MARY L. REV. 147 (1994).

[2] 141 S. Ct. 2485 (2021).

[3] 142 S. Ct. 661 (2022).

[4] 142 S. Ct. 647 (2022).

[5] 142 S. Ct. 2587 (2022).

[6] Mila Sohoni, *The Supreme Court, 2021 Term — Comment: The Major Questions Quartet*, 136 HARV. L. REV. 262, 267–90 (2022); *see also* Kristin E. Hickman & R. David Hahn, *Categorizing Chevron*, 81 OHIO ST. L.J. 611, 615–17 (2020) (discussing why these sorts of distinctions might matter in the context of *Chevron* deference).

[7] Sohoni, *supra* note 6, at 276–90.

She contends that the Court neglected to provide an adequate theoretical justification for a major questions canon, whether as a variation on the canon of constitutional avoidance or as a clear statement rule undergirded by principles associated with the nondelegation doctrine and Article I, section 1 of the U.S. Constitution.[8] Opinions from the Court acknowledging and addressing all of these concerns might have been helpful, perhaps, although one doubts that critics would be satisfied.

Yet Supreme Court opinions are not law review articles. Even Justices who share certain priors and premises, and who readily agree about the outcome of a case, may still disagree over the details and directions of the supportive reasoning. Substantial disagreements may yield concurring opinions, but the Justices often are willing to let lesser quibbles over dicta slide rather than write separately.[9] Analytical omissions and ambiguous rhetoric in judicial opinions may represent strategic choices to make the compromises necessary to cobble together a majority.[10]

My goal with this Response is not to defend the Quartet as exemplars of judicial opinion writing. I am more sympathetic to the Roberts Court in this regard than many legal scholars, but I have my own quibbles with the Quartet and likely would have written the opinions differently, too. At a minimum, Sohoni is correct that the Court missed an opportunity to provide clearer guidance to lower court judges regarding the major questions doctrine. The Court's failure to address at least some of Sohoni's questions and concerns likely will lead to some amount of confusion and inconsistency among future lower court decisions.

Instead, this Response draws from Sohoni's rather grudging acknowledgment of an argument with which she disagrees, that the Quartet reflects "merely responsible judicial minimalism . . . to cultivate the major questions doctrine on a rule-by-rule, statutory basis, gradually building out boundary lines that agencies must not cross, and to thereby allow the guardrails of nondelegation to accrete incrementally, in common law fashion."[11] In this manner, the Quartet and its reliance on the major questions doctrine align with a broader trend of Roberts Court decisions regarding separation of powers and administrative agencies: carefully narrow, calibrated to tweak the day-to-day of administrative governance incrementally, with plenty of carve outs and caveats, and with a preference for subconstitutional approaches, notwithstanding

[8] *Id.* at 297–315.

[9] *See, e.g.*, Ruth Bader Ginsburg, Lecture, *The Role of Dissenting Opinions*, 95 MINN. L. REV. 1, 3 (2010) ("[A] Justice, contemplating publication of a separate writing, should always ask herself: Is this dissent or concurrence really necessary?"); *cf.* Patricia M. Wald, *The Rhetoric of Results and the Results of Rhetoric: Judicial Writings*, 62 U. CHI. L. REV. 1371, 1412–15 (1995) (discussing reasons why judges write concurring or dissenting opinions).

[10] *Cf.* Wald, *supra* note 9, at 1377–80 (describing how judges accommodate one another by negotiating opinion language).

[11] Sohoni, *supra* note 6, at 314.

lofty flights of rhetoric about the Framers, liberty, and other constitutional values.[12] Part of the Roberts Court's incrementalism in separation of powers cases comes from its choice of remedies, such as its use of severability as a remedy for constitutional flaws in agency design decisions.[13] But the Roberts Court's doctrinal shifts in this area also are substantially more limited than they could be and seem designed more to accommodate rather than undermine the continued functioning of the administrative state — albeit with some new limitations. It's a path designed to please almost no one, or at least not many of those who debate these issues most vocally. Regardless, for lower court judges seeking guidance for future cases, and perhaps inclined to apply the major questions doctrine aggressively, the overall message should be clear: Proceed With Caution!

I. STRUCTURAL FORMALISM MEETS STARE DECISIS

Let us stipulate at the outset that, in addition to being more inclined toward originalist and textualist methods of interpretation, the Roberts Court also is more structurally formalist and more skeptical of agency action than any of its predecessors since at least the New Deal era.[14] In 1978, renowned administrative law scholar Kenneth Culp Davis described formal separation of powers, rule of law, and nondelegation principles as "barriers to the development of the administrative process" and the modern administrative state (and judicial review thereof) as "focused primarily on particular substantive programs, not on broad and general conceptions about the nature and function of government or of law."[15] Irrespective of whether Davis accurately characterized the Supreme Court's mid–twentieth century jurisprudence or merely read his own preferences into it, the Roberts Court by contrast takes seriously formalist conceptions of separation of powers, rule of law, and nondelegation principles. "Who decides?"[16] matters at least as much as, if not more than, the substantive policies being pursued through agency action.

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[12] *See* Gillian E. Metzger, *The Supreme Court, 2016 Term — Foreword: 1930s Redux: The Administrative State Under Siege*, 131 HARV. L. REV. 1, 36 (2017) (recognizing in Roberts Court jurisprudence "the sharp disconnect that often exists between the constitutional concerns invoked and the legal result reached").

[13] *See, e.g.*, *infra* section II.C, pp. 92–94.

[14] *See, e.g.*, Michael P. Allen, *The Roberts Court and How to Say What the Law Is*, 40 STETSON L. REV. 671, 694 (2011) (noting "a strong tendency toward formalistic reasoning in the Court's decisions, rejecting a more flexible, functionalist approach to constitutional interpretation" among Roberts Court decisional trends); Kent Barnett, *Standing for (and Up to) Separation of Powers*, 91 IND. L.J. 665, 674–76 (2016) (describing "[f]ormalism's ascendancy," *id.* at 676, and "triumph[] over functionalism," *id.* at 675); Gillian E. Metzger, *The Roberts Court and Administrative Law*, 2019 SUP. CT. REV. 1, 3 (2020) (observing the Roberts Court as "marked by a formalist and originalist approach to the separation of powers [and] a deep distrust of bureaucracy").

[15] 1 KENNETH CULP DAVIS, ADMINISTRATIVE LAW TREATISE § 2:1, at 59–60 (2d ed. 1978).

[16] Nat'l Fed'n of Indep. Bus. v. Dep't of Lab., 142 S. Ct. 661, 667 (2022) (Gorsuch, J., concurring).

The Roberts Court is troubled by judicial doctrines that have contributed to the gradual shift of governmental power away from Congress and the courts in favor of administrative agencies. After decades of Supreme Court decisions generally (although not always[17]) favoring structural functionalism and administrative flexibility,[18] no one should be surprised that the pendulum is swinging the other way, with the Roberts Court shifting doctrine regarding the structural Constitution and administrative governance in a more formalist and less pro-agency direction.

It is equally obvious, however, that those among the Justices who are inclined toward structural formalism, originalism, etc., are not uniformly so.[19] The Justices' fealty to stare decisis and to judicial restraint also varies tremendously as regards constitutional questions. In *Gamble v. United States*,[20] for example, Justice Alito defended stare decisis in constitutional interpretation as "promot[ing] the evenhanded, predictable, and consistent development of legal principles, foster[ing] reliance on judicial decisions, and contribut[ing] to the actual and perceived integrity of the judicial process."[21] According to Justice Alito, even when constitutional meaning is at issue, "a departure from precedent 'demands special justification.'"[22] By contrast, writing separately in the same case, Justice Thomas mostly rejected stare decisis in the constitutional context, explaining at length his view that the Court's job is to interpret and apply the Constitution as written, not other Justices' "erroneous" interpretations of it.[23] In *Ramos v. Louisiana*,[24] Justices

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[17] *See, e.g.*, Buckley v. Valeo, 424 U.S. 1, 124–37 (1976) (per curiam) (invalidating the appointment mechanism for Federal Election Commission members using formalist reasoning); Goldberg v. Kelly, 397 U.S. 254, 264 (1970) (interpreting the Due Process Clause to impose extensive procedural burdens on agency decisionmaking).

[18] *See, e.g.*, Ronald J. Krotoszynski, Jr., Johnjerica Hodge & Wesley W. Wintermyer, *Partisan Balance Requirements in the Age of New Formalism*, 90 NOTRE DAME L. REV. 941, 950–51 (describing the Court's twentieth-century separation of powers jurisprudence as sometimes formalist but often functionalist).

[19] *See, e.g.*, Min K. Lee, *Stare Decisis on Thin Ice: Mulling over the Supreme Court After* Ramos v. Louisiana, 45 SETON HALL LEGIS. J. 295, 296 (2021) (noting "sharply conflicting understandings of the principle of stare decisis" among the Justices).

[20] 139 S. Ct. 1960 (2019).

[21] *Id.* at 1969 (quoting Payne v. Tennessee, 501 U.S. 808, 827 (1991)).

[22] *Id.* (quoting Arizona v. Rumsey, 467 U.S. 203, 212 (1984)). Of course, Justice Alito controversially found such special justification to overturn *Roe v. Wade*, 410 U.S. 133 (1973); *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833 (1992); and *Abood v. Detroit Board of Education*, 431 U.S. 209 (1977). *See* Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228, 2265–78 (2022) (identifying and discussing five factors that he said "weigh strongly in favor of overruling *Roe* and *Casey*," *id.* at 2265); Janus v. AFSCME, Council 31, 138 S. Ct. 2448, 2478–85 (2018) (identifying and discussing five factors weighing against giving *Abood* precedential effect).

[23] *Gamble*, 139 S. Ct. at 1981–89 (Thomas, J., concurring).

[24] 140 S. Ct. 1390 (2020).

Gorsuch,[25] Sotomayor,[26] Kavanaugh,[27] Thomas,[28] and Alito[29] all authored opinions offering different ideas about stare decisis, when it applies, and what it requires.

Whether a particular Supreme Court decision actually follows stare decisis principles and adheres to precedent can be debatable. Holdings are precedential, while dicta is not, and which is which often is not clear.[30] The Court may intend explanatory reasoning to guide lower courts in future cases, but not every judicial musing that catches the eye of commenters must be followed to the *n*th degree.[31] On the other hand, today's offhand summary of existing precedent may become tomorrow's dominant two-part test.[32] Interpretive canons and methods are not given precedential effect, but some argue that perhaps they should be.[33]

For that matter, if the Court purports to retain a precedent but narrows or recasts it in some way, whether under the guise of interpretation or otherwise, then has the Court really adhered to stare decisis?[34] Administrative law is replete with examples of the Court interpreting its precedents in novel ways. In *Kisor v. Wilkie*,[35] Justice Kagan preserved the doctrine of *Auer* or *Seminole Rock* deference to agency interpretations of regulations by transforming the simple and highly deferential "controlling weight unless . . . plainly erroneous or inconsistent with the regulation"[36] into a much less deferential, five-stage inquiry,

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[25] The discussion of stare decisis in Justice Gorsuch's opinion for the Court was in part on behalf of five, *see id.* at 1404–07, in part on behalf of four, *see id.* at 1407–08, and in part on behalf of only three Justices, *see id.* at 1402–04.

[26] *See id.* at 1408–10 (Sotomayor, J., concurring as to all but Part IV-A) (writing to emphasize three points, all related to the application of stare decisis).

[27] *See id.* at 1410–16 (Kavanaugh, J., concurring in part) ("writ[ing] separately to explain my view of how stare decisis applies to this case," *id.* at 1410).

[28] *See id.* at 1421 (Thomas, J., concurring in the judgment) (invoking and applying his own approach to stare decisis and constitutional interpretation as previously articulated in *Gamble*).

[29] *See id.* at 1425 (Alito, J., dissenting) ("The doctrine of stare decisis gets rough treatment in today's decision.").

[30] *See, e.g.*, RANDY J. KOZEL, SETTLED VERSUS RIGHT 70–81 (2017) (describing aspects of precedential scope).

[31] *See id.*

[32] *See* Chevron U.S.A. Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837, 842–43 (1984); *see also* Thomas W. Merrill, *The Story of* Chevron*: The Making of an Accidental Landmark*, *in* ADMINISTRATIVE LAW STORIES 398, 420–21 (Peter L. Strauss ed., 2006) (noting Justice Stevens's lack of intent to establish a new two-part test or otherwise change the law in writing the *Chevron* decision).

[33] *See, e.g.*, Randy J. Kozel, *Constitutional Method and the Path of Precedent*, *in* 33 IUS GENTIUM: PRECEDENT IN THE UNITED STATES SUPREME COURT 159, 183–87 (Christopher J. Peters ed., 2013); Chad M. Oldfather, *Methodological Pluralism and Constitutional Interpretation*, 80 BROOK. L. REV. 1, 4–5 (2014).

[34] *See, e.g.*, Randy J. Kozel, *Retheorizing Precedent*, 70 DUKE L.J. 1025, 1026 (2021); Richard M. Re, Essay, *Narrowing Precedent in the Supreme Court*, 114 COLUM. L. REV. 1861, 1863–65 (2014).

[35] 139 S. Ct. 2400 (2019).

[36] *Id.* at 2428 (quoting Bowles v. Seminole Rock & Sand Co., 325 U.S. 410, 414 (1945)).

claiming precedent for every step along the way.[37] Lest one think this kind of precedential retheorizing is unique to the present day, consider the 1935 case of *Humphrey's Executor v. United States*,[38] wherein the Court dismissed most of Chief Justice Taft's seventy-one-page defense of an unfettered presidential removal power in *Myers v. United States*[39] as "dicta" to uphold statutory restrictions on the President's authority to remove Federal Trade Commissioners from office.[40] Likewise, in *Morrison v. Olson*[41] in 1988, the Court upheld statutory restrictions on the removal of independent counsels by interpreting away inconvenient reasoning from *Humphrey's Executor* while purporting to respect that precedent.[42]

The Quartet's approach to the major questions doctrine arguably reflects this sort of recasting of precedent in the name of adhering to it. In *West Virginia v. EPA*, Justice Kagan complained that "[t]he Court has never even used the term 'major questions doctrine' before."[43] That objection is not quite accurate. Justices had used the label previously in concurring and dissenting opinions.[44] In doing so, the Justices merely picked up what legal scholars and others in the legal community for many years had dubbed the strand of *Chevron* and statutory interpretation jurisprudence on which the Court relied.[45] Further, members of the Court have raised concerns for decades about agencies pushing the

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[37] *Id.* at 2414–18.

[38] 295 U.S. 602 (1935).

[39] 272 U.S. 52 (1926).

[40] *Humphrey's Ex'r*, 295 U.S. at 626–27.

[41] 487 U.S. 654 (1988).

[42] *Id.* at 687–93.

[43] West Virginia v. EPA, 142 S. Ct. 2587, 2634 (2022) (Kagan, J., dissenting).

[44] *See, e.g.*, Nat'l Fed'n of Indep. Bus. v. Dep't of Lab., 142 S. Ct. 661, 667–68 (2022) (Gorsuch, J., concurring); Dep't of Homeland Sec. v. Regents of the Univ. of Cal., 140 S. Ct. 1891, 1925 (2020) (Thomas, J., concurring in the judgment in part and dissenting in part); Gundy v. United States, 139 S. Ct. 2116, 2141–42 (2019) (Gorsuch, J., dissenting) (discussing the "major questions doctrine" as "nominally a canon of statutory construction" that the Court applies "in service of the constitutional rule that Congress may not divest itself of its legislative power by transferring that power to an executive agency").

[45] *See, e.g.*, Jacob Loshin & Aaron Nielson, *Hiding Nondelegation in Mouseholes*, 62 ADMIN. L. REV. 19, 65 & n.275 (2010); Abigail R. Moncrieff, *Reincarnating the "Major Questions" Exception to* Chevron *Deference as a Doctrine of Noninterference (or Why* Massachusetts v. EPA *Got It Wrong)*, 60 ADMIN. L. REV. 593, 594–95 (2008); *see also* Abbe R. Gluck & Lisa Schultz Bressman, *Statutory Interpretation from the Inside — An Empirical Study of Congressional Drafting, Delegation, and the Canons: Part I*, 65 STAN. L. REV. 901, 991–93 (2013) (documenting empirically awareness of the major questions doctrine among congressional legislation drafters); Cass R. Sunstein, Chevron *Step Zero*, 92 VA. L. REV. 187, 243–44 (2006) (describing "the concern that on major questions, interest-group power and agency self-dealing might produce a real risk, one that is sufficient to call for a reduced degree of judicial deference").

interpretive limits of ambiguous statutory delegations to pursue aggressive policy agendas, whether labeled as "jurisdictional" questions,[46] as "elephants in mouseholes,"[47] or otherwise.[48] In *King v. Burwell*,[49] Justice Kagan herself joined the Court's majority in rejecting the availability of *Chevron* deference and claiming for itself de novo review of an Internal Revenue Service interpretation of the Affordable Care Act based in no small part on the interpretation's "economic and political significance,"[50] although the Court in that case sided with the agency.[51]

Justice Kagan's broader point in *West Virginia v. EPA*, advanced as well by Sohoni, is closer to correct — that the version of the major questions doctrine advanced in the Quartet seemed meaningfully different from those precedents.[52] How much so, and whether the shift falls outside the normal parameters of doctrinal evolution and stare decisis as described above, is where at least some of the scholarly debate over the major questions doctrine will lie.

II. PATHS PROPOSED, PATHS NOT TAKEN

Beyond legal theory, what does it mean in practical terms for the Roberts Court to be more formalist, more originalist, and more skeptical of administrative agencies than its predecessors? If they truly wanted to pursue dramatic change and wreak havoc upon the administrative state, the Justices have no shortage of options. Legal scholars have been

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[46] *See, e.g.*, Miss. Power & Light v. Mississippi *ex rel.* Moore, 487 U.S. 354, 386–87 (1988) (Brennan, J., dissenting) ("Agencies do not 'administer' statutes confining the scope of their jurisdiction, and such statutes are not 'entrusted' to agencies."). In *City of Arlington v. FCC*, 569 U.S. 290 (2013), the Supreme Court rejected an exception from *Chevron* deference for jurisdictional questions. *Id.* at 297. Chief Justice Roberts dissented, asserting de novo review for whether "Congress has conferred on the agency interpretive authority over the question at issue." *Id.* at 312 (Roberts, C.J., dissenting).

[47] *See, e.g.*, EPA v. EME Homer City Generation, L.P., 572 U.S. 489, 528 (2014) (Scalia, J., dissenting) (quoting Whitman v. Am. Trucking Ass'ns, 531 U.S. 457, 468 (2001)); Gonzales v. Oregon, 546 U.S. 243, 267 (2006) (same).

[48] *See, e.g.*, FDA v. Brown & Williamson Tobacco Corp., 529 U.S. 120, 160 (2000) (rejecting an agency's interpretation of a statute because "we are confident that Congress could not have intended to delegate a decision of such economic and political significance to an agency in so cryptic a fashion"); *see also* Stephen Breyer, *Judicial Review of Questions of Law and Policy*, 38 ADMIN. L. REV. 363, 370 (1986) (suggesting a court is less likely to defer to an agency interpretation of a statute if "the legal question is an important one [because] Congress is more likely to have focused upon, and answered, major questions, while leaving interstitial matters to answer themselves in the course of the statute's daily administration").

[49] 135 S. Ct. 2480 (2015).

[50] *Id.* at 2489 (quoting Util. Air Regul. Grp. v. EPA, 573 U.S. 302, 324 (2014)).

[51] *Id.* at 2496; *see also* Kristin E. Hickman, *The (Perhaps) Unintended Consequences of* King v. Burwell, 2015 PEPP. L. REV. 56, 58 (arguing that Chief Justice Roberts's opinion for the Supreme Court in *King v. Burwell* should be seen as an effort "to accomplish, through alternative framing, a broader curtailment of *Chevron*'s scope that he advocated unsuccessfully" in *City of Arlington*).

[52] West Virginia v. EPA, 142 S. Ct. 2587, 2633–34 (2022) (Kagan, J., dissenting); Sohoni, *supra* note 6, at 271–72.

proposing doctrinal alternatives to overhaul the administrative law status quo for a long time. The Court could reinvigorate the nondelegation doctrine by replacing the intelligible principle standard with a sweeping and categorical prohibition against all agency regulations carrying the force of law or all regulations issued pursuant to statutory grants of general rulemaking authority.[53] The Court could repudiate *Chevron* deference outright, calling into question the validity of thousands of agency statutory interpretations upheld by courts over the past four decades.[54] Upon finding a constitutional deficiency in an agency's structure, the Court could effectively nullify the agency's existence, or at least its capacity to act in legally consequential ways, until Congress passes new legislation reconstituting the agency to satisfy constitutional constraints.[55] The Roberts Court has done none of these things, and not for lack of opportunity.

A. *The Nondelegation Doctrine Is Still (Mostly) Dead*

The nondelegation doctrine holds that Article I, section 1 of the Constitution vests in Congress the legislative powers "herein granted" and that Congress may not delegate those legislative powers to the executive branch (or anyone else).[56] For decades now, the nondelegation doctrine has been moribund.[57] Since at least the 1970s, legal scholars and others have called for replacing the intelligible principle standard

[53] *See, e.g.*, PHILIP HAMBURGER, IS ADMINISTRATIVE LAW UNLAWFUL? 2–3, 377–78 (2014); *see also* Dep't of Transp. v. Ass'n of Am. R.Rs., 575 U.S. 43, 70–71 (2015) (Thomas, J., concurring in the judgment) (arguing that the Constitution does not allow the Executive to "formulate generally applicable rules of private conduct," *id.* at 70, and citing Hamburger's book as support); Kristin E. Hickman, Foreword, *Nondelegation as Constitutional Symbolism*, 89 GEO. WASH. L. REV. 1079, 1125–30 (2021) (discussing this and other categorical alternatives to the intelligible principle standard).

[54] *See, e.g.*, Petition for a Writ of Certiorari at i, Buffington v. McDonough, No. 21-972, 2022 WL 72897 (Jan. 3, 2022) (asking the Court to grant certiorari to overrule *Chevron*); Jack M. Beerman, *End the Failed* Chevron *Experiment Now: How* Chevron *Has Failed and Why It Can and Should Be Overruled*, 42 CONN. L. REV. 779, 782 (2010); Cass R. Sunstein, *Zombie* Chevron*: A Celebration*, 82 OHIO ST. L.J. 565, 568–75 (2021).

[55] Judge Karen LeCraft Henderson proposed this outcome for the Consumer Financial Protection Bureau. *See* PHH Corp. v. Consumer Fin. Prot. Bureau, 881 F.3d 75, 160 (D.C. Cir. 2018) (Henderson, J., dissenting).

[56] *See, e.g.*, Gundy v. United States, 139 S. Ct. 2116, 2123 (2019) (describing the doctrine); Thomas W. Merrill, *Rethinking Article I, Section 1: From Nondelegation to Exclusive Delegation*, 104 COLUM. L. REV. 2097, 2098–99 (2004) (same).

[57] *See, e.g.*, DAVIS, *supra* note 15, § 3.2, at 150 (describing nondelegation as a failed legal doctrine); BERNARD SCHWARTZ, ADMINISTRATIVE LAW § 12, at 34 (1976) (contending that the nondelegation doctrine "can not be taken literally").

and reinvigorating the nondelegation doctrine.[58] Notwithstanding several opportunities since then,[59] the Court has not invalidated a statute on nondelegation grounds since 1935.[60]

Before resolving the Quartet, a majority of the Justices now on the Court had signaled interest in revitalizing the nondelegation doctrine. In *Gundy v. United States*,[61] Justice Gorsuch outlined a proposed alternative to the intelligible principle standard and was joined by Chief Justice Roberts and Justice Thomas.[62] Justice Alito concurred in *Gundy*'s outcome but called for reconsidering the intelligible principle standard on another occasion.[63] In *Paul v. United States*,[64] Justice Kavanaugh — who did not participate in *Gundy* — authored a statement in which he expressed a similar desire to rethink the intelligible principle standard and spoke favorably of Justice Gorsuch's alternative approach.[65] Justice Kavanaugh stopped short of endorsing Justice Gorsuch's *Gundy* opinion outright, however. Instead, he spoke of "major policy question[s]" and cited some of the precedents from which the Quartet's version of the major questions doctrine derives.[66]

At no time in its post–New Deal history has the Supreme Court seemed more likely to bring the nondelegation doctrine back to life than heading into the 2021 Term. As the lone case among the Quartet in which the Court actually granted certiorari and heard oral argument, *West Virginia v. EPA* was the most anticipated vehicle for revitalizing the nondelegation doctrine by replacing the intelligible principle standard with a more robust limitation on congressional delegations of policymaking authority to agencies.[67] Pursuing that route, as the Justices

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[58] *See, e.g.*, JOHN HART ELY, DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW 131–34 (1980); MARTIN H. REDISH, THE CONSTITUTION AS POLITICAL STRUCTURE 136 (1995); J. Skelly Wright, *Beyond Discretionary Justice*, 81 YALE L.J. 575, 582–83 (1972) (book review); *see also* Carl McGowan, *Congress, Court, and Control of Delegated Power*, 77 COLUM. L. REV. 1119, 1127 (1977) (acknowledging suggestions that courts revive the nondelegation doctrine).

[59] *See, e.g.*, *Gundy*, 139 S. Ct. at 2121; Whitman v. Am. Trucking Ass'ns, 531 U.S. 457, 462 (2001); Mistretta v. United States, 488 U.S. 361, 371 (1989); Indus. Union Dep't, AFL-CIO v. Am. Petroleum Inst., 448 U.S. 607, 646 (1980) (plurality opinion).

[60] A.L.A. Schechter Poultry Corp. v. United States, 295 U.S. 495, 542 (1935); Pan. Refin. Co. v. Ryan, 293 U.S. 388, 433 (1935).

[61] 139 S. Ct. 2116 (2019).

[62] *Id.* at 2135–37 (Gorsuch, J., dissenting).

[63] *Id.* at 2131 (Alito, J., concurring in the judgment).

[64] 140 S. Ct. 342 (2019) (mem.).

[65] *Id.* at 342 (Kavanaugh, J., respecting the denial of certiorari).

[66] *Id.* (citing Util. Air Regul. Grp. v. EPA, 573 U.S. 302 (2014); FDA v. Brown & Williamson Tobacco Corp., 529 U.S. 120 (2000); and MCI Telecomms. Corp. v. Am. Tel. & Tel. Co., 512 U.S. 218 (1994)).

[67] *See, e.g.*, Nathan Richardson, *The Supreme Court's New Threat to Climate Policy*, RES. (Nov. 5, 2021), https://www.resources.org/common-resources/the-supreme-courts-new-threat-to-climate-policy [https://perma.cc/9LJW-8S2W]; LINDA TSANG & KATE R. BOWERS, CONG. RSCH. SERV., LSB10666, CONGRESS'S DELEGATION OF "MAJOR QUESTIONS": THE SUPREME COURT'S REVIEW OF EPA'S AUTHORITY TO REGULATE GREENHOUSE GAS EMISSIONS MAY HAVE

seemed poised to do, would be a substantial doctrinal shift for the Court.[68] It would overturn a longstanding and consistently applied legal standard and raise questions about the constitutional validity of many statutes previously upheld by the Court based on intelligible principles, including the Clean Air Act[69] and the Occupational Safety and Health Act[70] — although it is worth noting that Justice Gorsuch in *Gundy* took care to say that "[a]t least some" (and perhaps many) of those precedents might survive his proposed alternative as well.[71]

But the Court did not overturn the intelligible principle standard in *West Virginia v. EPA*. In fact, the Court did not approach any of the Quartet as a matter of constitutional interpretation at all, embracing instead the major questions doctrine as a subconstitutional canon of statutory interpretation.

Perhaps as a result, the vocal enthusiasm of some of the Justices for replacing the intelligible principle standard seems to be on hold. Even Justice Gorsuch, arguably the most vocal proponent of replacing the intelligible principle standard,[72] did not suggest the nondelegation doctrine as an alternative basis for the Court's holding in *West Virginia v. EPA*. Instead, in his concurrence, Justice Gorsuch merely claimed nondelegation and separation of powers principles as the conceptual bases for major questions as a substantive canon of statutory interpretation.[73] He then dedicated most of his concurrence to providing a nonexclusive list of circumstances in which the Court might apply that major questions canon and "several telling clues" for "what qualifies as a clear congressional statement authorizing an agency's action,"[74] only some of which were suggested by the majority opinion.[75] As restrained (for him) as Justice Gorsuch was in this regard, only Justice Alito joined him in pushing even so robust a vision for a major questions canon as a limitation on congressional delegations of policymaking discretion to agencies.[76]

BROAD IMPACTS 4 (2021); *see also* Brief of Amicus Curiae Americans for Prosperity in Support of Petitioners at 23–26, West Virginia v. EPA, 142 S. Ct. 2587 (2022) (Nos. 20-1530, 20-1531, 20-1778 & 20-1780), 2021 WL 6118360, at *23–26 (arguing for overturning the intelligible principle standard).

[68] *See* Hickman, *supra* note 53, at 1136.

[69] *See* Whitman v. Am. Trucking Ass'ns, 531 U.S. 457, 486 (2001).

[70] *See* Indus. Union Dep't, AFL-CIO v. Am. Petroleum Inst., 448 U.S. 607, 611–12, 646 (1980) (plurality opinion).

[71] Gundy v. United States, 139 S. Ct. 2116, 2140 (2019) (Gorsuch, J., dissenting).

[72] *See id.* at 2135–36.

[73] *See* West Virginia v. EPA, 142 S. Ct. 2587, 2617–18 (2022) (Gorsuch, J., concurring).

[74] *Id.* at 2622.

[75] *Id.* at 2620–26; *see also* Nat'l Fed'n of Indep. Bus. v. Dep't of Lab., 142 S. Ct. 661, 668–70 (2022) (Gorsuch, J., concurring) (describing the major questions doctrine in nondelegation doctrine and separation of powers terms).

[76] West Virginia v. EPA, 142 S. Ct. at 2616 (Gorsuch, J., concurring). By comparison, as noted, Justice Gorsuch's call in *Gundy* to replace the intelligible principle standard outright was joined by both Chief Justice Roberts and Justice Thomas, and supported in principle by Justice Kavanaugh as well as Justice Alito. *See supra* notes 61–66 and accompanying text.

Beyond leaving undisturbed almost a century of precedent applying the intelligible principle standard, the Quartet's reliance on the major questions doctrine is distinct from reinvigorating the nondelegation doctrine in one very important respect. Declaring that a statutory delegation violates the nondelegation doctrine, and thus the Constitution, would preclude Congress from ever relying upon agency officials to resolve the associated policy matters absent a constitutional amendment. By comparison, with the Quartet and the major questions doctrine, the Court held that Congress, as a matter of statutory interpretation, *did not* give agencies the necessary authority to adopt the regulations at issue, not that Congress, as a matter of constitutional interpretation, *could not* give agencies that authority.

This distinction is important. To be sure, congressional action on controversial policy questions is always challenging, and the Court has not provided Congress with magic words or otherwise offered extensive guidance regarding just how much more statutory detail it expects Congress to provide to avoid the major questions doctrine. Nevertheless, persuading Congress to amend a statute remains an easier proposition than navigating the constitutional amendment process. And amending a statute to delegate more clearly to an agency the requisite rulemaking power to address a particular contemporary problem, perhaps with some amount of guidance regarding the tools Congress would like the agency to use or approaches that Congress would like the agency to follow, is much easier than amending the same statute with the specificity that would be necessary if the Court required Congress to resolve all of "the policy decisions" itself and leave only "the details" to agencies (as would be the case if the Court replaced the intelligible principle standard as Justice Gorsuch proposed in *Gundy*).[77]

Irrespective of the *doctrinal* effect of replacing the intelligible principle standard, I have argued elsewhere that the *practical* impact of such a move on administrative governance likely would be less dramatic than some expect for two reasons: (1) the sheer number and varying types of delegations contained in the U.S. Code, and (2) the incremental, case-by-case, provision-by-provision, statute-by-statute alternatives that Justice Gorsuch and others on the Court seemed to favor over more sweeping and categorical approaches suggested by some scholars.[78] Any standard that evaluates delegations individually, one at a time, would simply be too limited in its reach to curtail either congressional delegations or agency policymaking very much. Just as most agency actions never see the inside of a courtroom,[79] the same would be true of most

[77] *Gundy*, 139 S. Ct. at 2136 (Gorsuch, J., dissenting).

[78] *See* Hickman, *supra* note 53, at 1125–30 (surveying more categorical alternatives).

[79] *See, e.g.*, Nicholas R. Parrillo, *Federal Agency Guidance and the Power to Bind: An Empirical Study of Agencies and Industries*, 36 YALE J. ON REG. 165, 171 (2019); Peter L. Strauss, *Publication Rules in the Rulemaking Spectrum: Assuring Proper Respect for an Essential Element*, 53 ADMIN. L. REV. 803, 806 (2001).

delegations. As applied in the Quartet, the major questions doctrine similarly anticipates an individualized analysis of statutory text. Thus, whether it functions as an exception from *Chevron* deference or as an independent canon of statutory interpretation, the major questions doctrine has these same practical limitations. Agencies may be less inclined to pursue the very largest and most boundary-pushing regulation projects given the major questions doctrine, but such restraint still leaves agencies with a tremendous range of policymaking discretion.

Finally, as described by the Court in *West Virginia v. EPA* and applied throughout the Quartet, the major questions doctrine is not so standardless as some detractors suggest. Apart from the possibilities described by Justice Gorsuch's concurrence in *West Virginia v. EPA*, Chief Justice Roberts for the Court suggested several guideposts and guardrails for applying the major questions doctrine, including (1) "the 'history and the breadth of the authority that [the agency] has asserted'";[80] (2) "the 'economic and political significance' of that assertion";[81] and (3) the extent to which the agency is relying on "'modest words,' 'vague terms,' or 'subtle device[s]'" rather than more direct delegations from Congress.[82] Put more succinctly, one might say based on Chief Justice Roberts's opinion that the major questions doctrine applies to curtail administrative discretion when an agency stretches the boundaries of statutory interpretation to claim new authority to address big problems that, previously, were not obviously within the agency's purview.

To be sure, this description of the major questions doctrine is a mushy standard rather than a bright-line rule, which makes its application more subjective and uncertain than admirers of the administrative state might prefer. The drawbacks of standards are well known, including a lack of certainty ex ante and a potential for inconsistency of application.[83] Yet, bright-line rules have their own drawbacks, and mushy standards are not new to constitutional law.[84]

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[80] West Virginia v. EPA, 142 S. Ct. at 2608 (quoting FDA v. Brown & Williamson Tobacco Corp., 529 U.S. 120, 160 (2000)).

[81] *Id.* (quoting *Brown & Williamson*, 529 U.S. at 160).

[82] *Id.* at 2609 (quoting Whitman v. Am. Trucking Ass'ns, 531 U.S. 457, 468 (2001)).

[83] *See, e.g.*, Pierre Schlag, *Rules and Standards*, 33 UCLA L. REV. 379, 400 (1985) (summarizing some of the drawbacks of standards).

[84] *See id.* at 390–98. For just a few additional examples from the voluminous literature on the use of rules and standards in law, see generally Larry Alexander, *Constitutional Rules, Constitutional Standards, and Constitutional Settlement:* Marbury v. Madison *and the Case for Judicial Supremacy*, 20 CONST. COMMENT. 369 (2003); Kevin M. Clermont, *Rules, Standards, and Such*, 68 BUFF. L. REV. 751 (2020); Louis Kaplow, *Rules Versus Standards: An Economic Analysis*, 42 DUKE L.J. 557 (1992); Thomas W. Merrill, *The* Mead *Doctrine: Rules and Standards, Meta-rules and Meta-standards*, 54 ADMIN L. REV. 807 (2002); and Kathleen M. Sullivan, *The Supreme Court, 1991 Term — Foreword: The Justices of Rules and Standards*, 106 HARV. L. REV. 22 (1992).

None of this is to suggest that the evolution and application of the major questions doctrine is no big deal. The Quartet undoubtedly will prompt agency officials to restrain their rulemaking impulses on some occasions, especially if they are unsure of their authority to act. Courts can anticipate a new set of challenges to agency actions on major questions grounds. Nevertheless, the subconstitutional major questions doctrine is substantially more restrained and incremental, and arguably more consistent with stare decisis principles, than the constitutional alternatives on offer.

B. Chevron *Still Lives*

Like the nondelegation doctrine's intelligible principle standard, the *Chevron* doctrine has been under attack and, arguably, in decline. Before his passing, Justice Scalia — long one of *Chevron*'s staunchest proponents[85] — raised doubts regarding *Chevron*'s underpinnings.[86] Since then, Justice Thomas has questioned whether *Chevron* deference violates constitutional separation of powers principles.[87] Justice Gorsuch, too, has advocated abandoning *Chevron* deference, characterizing it as "permit[ting] all too easy intrusions on the liberty of the people."[88] Justice Kavanaugh also has called *Chevron* "an atextual invention by the courts" and "a judicially orchestrated shift of power from Congress to the Executive Branch" that "encourages the Executive Branch (whichever party controls it) to be extremely aggressive in seeking to squeeze its policy goals into ill-fitting statutory authorizations and restraints."[89]

The Court also has not applied *Chevron* to defer to an agency interpretation of a statute since 2016,[90] notwithstanding several opportunities to do so.[91] Some scholars have pointed to the Court's failure to cite *Chevron* in these cases as evidence that the doctrine is in decline, if

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[85] *See, e.g.*, Antonin Scalia, *Judicial Deference to Administrative Interpretations of Law*, 1989 DUKE L.J. 511, 521 ("[I]n the long run *Chevron* will endure and be given its full scope . . . because it more accurately reflects the reality of government, and thus more adequately serves its needs.").

[86] Perez v. Mortg. Bankers Ass'n, 575 U.S. 92, 109–10 (2015) (Scalia, J., concurring in the judgment).

[87] *See, e.g.*, County of Maui v. Haw. Wildlife Fund, 140 S. Ct. 1462, 1482 (2020) (Thomas, J., dissenting); Baldwin v. United States, 140 S. Ct. 690, 691–92 (2020) (Thomas, J., dissenting from the denial of certiorari).

[88] Gutierrez-Brizuela v. Lynch, 834 F.3d 1142, 1151 (10th Cir. 2016) (Gorsuch, J., concurring); *see also County of Maui*, 140 S. Ct. at 1479 (2020) (joining Justice Thomas's dissent questioning the constitutionality of *Chevron* deference).

[89] *See, e.g.*, Brett M. Kavanaugh, *Fixing Statutory Interpretation*, 129 HARV. L. REV. 2118, 2150 (2016) (book review).

[90] *See* Cuozzo Speed Techs., LLC v. Lee, 136 S. Ct. 2131, 2144 (2016); Kristin E. Hickman & Aaron L. Nielson, *Narrowing* Chevron*'s Domain*, 70 DUKE L.J. 931, 1001–13 (2021) (categorizing all of the cases in which the Court cited *Chevron* through the 2019 Term).

[91] *See, e.g.*, Niz-Chavez v. Garland, 141 S. Ct. 1474, 1485 (2021) (evaluating agency statutory interpretation without invoking *Chevron*, despite briefing claiming deference); Babb v. Wilkie, 140 S. Ct. 1168, 1177 (2020) (same); BNSF Ry. Co. v. Loos, 139 S. Ct. 893, 899–900 (2019) (same).

not outright defunct.[92] As James Kunhardt and Professor Anne Joseph O'Connell have documented, agencies may be adjusting their rulemaking practices in response to the uncertainty created by the Court's silence.[93] Sohoni concludes that the Quartet has separated the major questions inquiry from *Chevron* analysis, and thus labels *Chevron* "a derelict."[94] Perhaps the Court one day will be explicit that it has rejected *Chevron*.

Or maybe it won't. Many commentators anticipated that the Court might overturn *Chevron* deference outright in its 2021 Term,[95] either in *American Hospital Ass'n v. Becerra*[96] (where briefing expressly addressed whether the Court should overturn *Chevron*[97] and the issue was discussed at oral argument[98]) or, alternatively, in *Becerra v. Empire Health Foundation*[99] (where the government also asserted *Chevron* deference[100]). That did not happen. Instead, the Court again was merely *silent* regarding *Chevron* as it evaluated agency statutory interpretations by performing its own independent analysis using traditional tools of statutory interpretation as suggested by *Chevron*'s footnote nine.[101]

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92 *See, e.g.*, Nathan Richardson, *Deference Is Dead (Long Live* Chevron*)*, 73 RUTGERS U. L. REV. 441, 485–93 (2021).

93 *See, e.g.*, James Kunhardt & Anne Joseph O'Connell, *Judicial Deference and the Future of Regulation*, BROOKINGS (Aug. 18, 2022), https://www.brookings.edu/research/judicial-deference-and-the-future-of-regulation [https://perma.cc/G57Q-Z79F].

94 Sohoni, *supra* note 6, at 281.

95 *See, e.g.*, Nicholas Bagley, Chevron *Deference at Stake in Fight over Payments for Hospital Drugs*, SCOTUSBLOG (Nov. 29, 2021, 9:28 AM), https://www.scotusblog.com/2021/11/chevron-deference-at-stake-in-fight-over-payments-for-hospital-drugs [https://perma.cc/TTC7-UZTC]; David Bernstein, *The Supreme Court Could Foster a New Kind of Civil War*, POLITICO (June 14, 2022, 5:00 PM), https://www.politico.com/news/magazine/2022/06/14/supreme-court-civil-war-00039543 [https://perma.cc/K2TW-NVN7].

96 142 S. Ct. 1896 (2022).

97 *See, e.g.*, Brief Amicus Curiae of Pacific Legal Foundation in Support of Petitioners at 7, *Am. Hosp. Ass'n* (No. 20-1114), 2021 WL 4135099, at *7 ("[T]his Court should take this opportunity to reconsider *Chevron* deference."); Brief of Amicus Curiae Americans for Prosperity Foundation In Support of Neither Party at 4, *Am. Hosp. Ass'n* (No. 20-1114), 2021 WL 4173461, at *4 ("The Court should squarely overrule *Chevron* here and now."); Brief for Amicus Curiae the Chamber of Commerce of the United States of America in Support of Neither Party at 3, *Am. Hosp. Ass'n* (No. 20-1114), 2021 WL 4219174, at *3 (encouraging the Court at least to "take this opportunity to restate, clarify, and reinforce the limitations and requirements on *Chevron* deference"); Brief for the Respondents at 19–20, *Am. Hosp. Ass'n* (No. 20-1114), 2021 WL 4937288, at *19–20 (claiming *Chevron* deference).

98 Transcript at Oral Argument at 5, 30–33, *Am. Hosp. Ass'n* (No. 20-1114), https://www.supremecourt.gov/oral_arguments/argument_transcripts/2021/20-1114_l6h2.pdf [https://perma.cc/J97H-D96X].

99 142 S. Ct. 2354 (2022).

100 Brief for the Petitioner at 23, 26, *Empire Health Found.* (No. 20-1312), 2021 WL 3931359, at *23, *26.

101 Chevron U.S.A. Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837, 843 n.9 (1984) (calling the judiciary "the final authority on issues of statutory construction" and instructing courts to "employ[] traditional tools of statutory construction" to ascertain congressional intent).

Ignoring precedent where it might apply can foreshadow the Court's eventually overturning or abandoning that precedent.[102] But silence does not a holding make. By merely remaining silent rather than overruling *Chevron* outright, the Court has preserved the doctrine's availability for future cases.

Chevron has always had a more substantial effect on case outcomes in the lower courts than at the Supreme Court.[103] The Justices may have cited *Chevron* in 238 cases from 1984 through the 2019 Term,[104] but for all the hype, the Court only applied the *Chevron* standard to evaluate an agency's interpretation of a statute in 107 cases[105] and only deferred to the agency under *Chevron* in 72 of them.[106] As Professor William Eskridge and Lauren Baer documented, from 1984 through the end of the 2005 Term, the Court applied *Chevron* in only 8.3%, and relied purely on its own reasoning without resort to any deferential canon, presumption, or standard in more than 50%, of 1014 cases evaluating agency statutory interpretations.[107] Even when they limited their analysis to cases in which they felt *Chevron* clearly should apply, Eskridge and Baer found that the Court applied *Chevron* in at most 30% of cases.[108] Professors Kent Barnett and Christopher Walker similarly have interpreted these findings to mean that, even before the Court's present silence, its "questionable loyalty to *Chevron* suggests that the doctrine is not meant to discipline Supreme Court decisionmaking. Instead, the doctrine may better serve to control lower courts and

[102] For example, consider the saga of the Supreme Court's *Lemon* test for evaluating Establishment Clause violations, which various Justices criticized and the Court repeatedly ignored for years before finally declaring it "long ago abandoned." Kennedy v. Bremerton Sch. Dist., 142 S. Ct. 2407, 2427 (2022); *see also* Amanda Harmon Cooley, *The Persistence of* Lemon, 47 U. DAYTON L. REV. 411, 422–35 (2022) (documenting the history of the *Lemon* test).

[103] *See* Kent Barnett & Christopher J. Walker, Chevron *in the Circuit Courts*, 116 MICH. L. REV. 1, 18 (2017) (finding *Chevron* has had greater impact in federal circuit court than Supreme Court decisionmaking).

[104] *See* Hickman & Nielson, *supra* note 90, at 984.

[105] *Id.* at 986.

[106] *Id.* at 1001–04.

[107] William N. Eskridge, Jr. & Lauren E. Baer, *The Continuum of Deference: Supreme Court Treatment of Agency Statutory Interpretations from* Chevron *to* Hamdan, 96 GEO. L.J. 1083, 1094, 1100, 1121 (2008). *But see* Natalie Salmanowitz & Holger Spamann, *Does the Supreme Court Really Not Apply* Chevron *When It Should?*, 57 INT'L REV. L. & ECON. 81, 82 (2019) (analyzing the cases differently).

[108] Eskridge & Baer, *supra* note 107, at 1124–25.

provide nationwide uniformity."[109] In this vein, the government continues both to claim and to receive *Chevron* deference in the lower courts.[110]

Regardless, although Sohoni asserts the contrary,[111] the Supreme Court's silence regarding *Chevron* in the Quartet does not necessarily prove that doctrine's demise nor separate the major questions doctrine from its scope.[112] The Court's *Chevron* jurisprudence anticipates three steps: first, the *Mead* inquiry of whether Congress delegated authority to act with the force of law and the agency acted in the exercise of that authority;[113] second, the *Chevron* step one inquiry of whether the statute's meaning is clear or ambiguous;[114] and third, the *Chevron* step two inquiry of whether the agency's interpretation of an ambiguous statute is reasonable.[115] The Court has never been consistent, however, in ordering those steps. Whereas the Court often has applied *Mead*'s inquiry as a "step zero" that comes first,[116] other of the Court's opinions have approached *Mead* as a "step one-and-a-half" that comes only after deciding that the statute's meaning is ambiguous.[117] Still other Court decisions and academic examinations rearrange or blend the steps in different ways.[118] As the Court has observed repeatedly, *Chevron* step one entails the application of "traditional tools of statutory construction"

[109] Barnett & Walker, *supra* note 103, at 18; *see also* City of Arlington v. FCC, 569 U.S. 290, 307 (2013) (describing *Chevron* as having a "stabilizing purpose" by preventing inconsistencies in interpretation among the circuit courts); Nat'l Cable & Telecomm. Ass'n v. Brand X Internet Servs., 545 U.S. 967, 1003 (2005) (Stevens, J., concurring) (suggesting that *Chevron* applies differently in cases concerning prior Supreme Court interpretations of statutes than those concerning prior court of appeals interpretations).

[110] *See, e.g.*, Shanxi Hairui Trade Co. v. United States, 39 F.4th 1357, 1360–61 (Fed. Cir. 2022); Oakbrook Land Holdings, LLC v. Comm'r, 28 F.4th 700, 718–19 (6th Cir. 2022); Huawei Techs. USA, Inc. v. FCC, 2 F.4th 421, 436–43 (5th Cir. 2021).

[111] Sohoni, *supra* note 6, at 281–82.

[112] *Cf.* Jonathan H. Adler, West Virginia v. EPA*: Some Answers About Major Questions*, 2021–2022 CATO SUP. CT. REV. 37, 57–62 (2022) (identifying delegation as a shared premise for the major questions doctrine and *Chevron* deference).

[113] United States v. Mead Corp., 533 U.S. 218, 226–27 (2001).

[114] Chevron U.S.A. Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837, 842–43 (1984).

[115] *Id.* at 843; *see also* Kristin E. Hickman, *The Three Phases of* Mead, 83 FORDHAM L. REV. 527, 537–41 (2014) (documenting the steps).

[116] *See, e.g.*, United States v. Eurodif S.A., 555 U.S. 305, 316 (2009); Household Credit Servs., Inc. v. Pfennig, 541 U.S. 232, 242 (2004); *see also, e.g.*, Thomas W. Merrill & Kristin E. Hickman, Chevron*'s Domain*, 89 GEO. L.J. 833, 873 (2001) (describing the *Mead* inquiry in "step zero" terms); Sunstein, *supra* note 45, at 191 (same).

[117] *See, e.g.*, Esquivel-Quintana v. Sessions, 137 S. Ct. 1562, 1572 (2017); Mayo Found. for Med. Educ. & Rsch. v. United States, 562 U.S. 44, 52–58 (2011); Michael P. Healy, *Reconciling* Chevron, Mead, *and the Review of Agency Discretion: Source of Law and the Standards of Judicial Review*, 19 GEO. MASON L. REV. 1, 39–40 (2011) (arguing that *Mead* analysis generally ought to come after *Chevron* step one).

[118] *See, e.g.*, Nicholas R. Bednar & Kristin E. Hickman, Chevron*'s Inevitability*, 85 GEO. WASH. L. REV. 1392, 1428–41 (2017) (documenting different conceptions of *Mead* and *Chevron* reflected in the jurisprudence and literature); Hickman, *supra* note 115, at 537–47 (documenting different approaches to *Mead* and *Chevron* among the Justices).

to discern congressional intent, much like de novo review.[119] Whether under the step one-and-a-half model or otherwise, it has been entirely common for the possibility of deference to come into play only after the Court decides for itself that traditional tools fail to resolve statutory meaning. Under such circumstances, the Court has no need to cite *Chevron* until such time as it decides that traditional tools of statutory interpretation fail to resolve statutory meaning. Throughout *Chevron*'s tenure, the Court's mere silence regarding *Chevron* in one statutory interpretation case has offered little to no hint of the likelihood (or lack thereof) that the Court might apply *Chevron* in a subsequent case. The hostility that some of the Justices have shown toward *Chevron* deference simply gives the Court an additional reason to avoid mentioning *Chevron* if the deference question can be avoided by resolving statutory meaning using traditional tools.

Additionally, to the extent the Quartet casts the major questions doctrine as a substantive canon of statutory interpretation, it falls in the midst of the gray area of how substantive canons square with *Chevron* analysis, including whether they should be taken into account at *Chevron* step one or *Chevron* step two. Legal scholars have debated that question for some time,[120] while the Supreme Court just has been inconsistent in its treatment. In some cases, the Court has applied the constitutional avoidance canon to bolster findings of statutory clarity and reject the agency's interpretation at *Chevron* step one.[121] On other occasions, however, the Court has postponed or outright rejected consideration of constitutional avoidance until *Chevron* step two, after a finding of statutory ambiguity.[122] Absent a more explicit statement, little in the Quartet suggests that the major questions doctrine as a substantive canon would fare differently.

The Supreme Court's approach to *Chevron* is and always has been malleable. One must take care not to read too much into what the Court does not say outright. The Court's silences allow it to reserve the availability of *Chevron* deference for future cases. The Court also has preserved for itself whether and how the major questions doctrine as developed in the Quartet might interact with *Chevron*. Thus, irrespective of occasional sweeping rhetoric, the Roberts Court's actual doctrinal pronouncements regarding *Chevron* are more restrained and incremental than dramatic and pivotal.

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119 *Chevron*, 467 U.S. at 842–43 & n.9.

120 *See, e.g.*, ADRIAN VERMEULE, JUDGING UNDER UNCERTAINTY: AN INSTITUTIONAL THEORY OF LEGAL INTERPRETATION 211 (2006); Kenneth A. Bamberger, *Normative Canons in the Review of Administrative Policymaking*, 118 YALE L.J. 64, 70–84 (2008); Cass R. Sunstein, *Nondelegation Canons*, 67 U. CHI. L. REV. 315, 330 (2000).

121 *See* Solid Waste Agency of N. Cook Cnty. v. U.S. Army Corps of Eng'rs, 531 U.S. 159, 172–74 (2001); MCI Telecomms. Corp. v. Am. Tel. & Tel. Co., 512 U.S. 218, 230–32 (1994).

122 *See, e.g.*, Dep't of Hous. & Urb. Dev. v. Rucker, 535 U.S. 125, 134–35 (2002); Edward J. DeBartolo Corp. v. Fla. Gulf Coast Bldg. & Constr. Trades Council, 485 U.S. 568, 574–75 (1988).

C. *Agencies Soldier On*

Agency design represents yet another area in which the Roberts Court has moved its separation of powers jurisprudence in a more formalist and less pro-agency direction, at least as a matter of doctrinal theory. Congress often prescribes by statute who will appoint the officers of the United States who in turn perform agencies' legally critical rulemaking and adjudication functions; Congress also often imposes statutory limitations on the authority of the President (or other higher-ranking officers) to remove those officers from office.[123] Precisely who is an officer of the United States and whether a particular officer is an inferior officer whose appointment Congress can vest in the President alone, the head of a department, or a court of law can be challenging questions given dozens of agencies and myriad government officials exercising varying types and degrees of authority. For most of the twentieth century, the Supreme Court was willing to go along with congressional preferences regarding how to structure an agency's leadership. Such is no longer the case.

Unitary executive theory — the idea that the Constitution's Article II requires "all federal officers exercising executive power [to] be subject to the direct control of the President," including those at independent agencies[124] — often goes hand in hand with structural formalism,[125] although some functionalists support the argument as well.[126] Consistent with unitary executive theory, one hallmark of Roberts Court separation of powers jurisprudence has been its whittling away of statutory limitations on the President's authority to remove federal officers from office. In this way, the Court has substantially reduced Congress's ability to pursue its own preferences for how federal agencies are structured. Yet it has done so while claiming quite explicitly that it is not overturning precedent,[127] despite calls from some of the Justices to do precisely

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[123] *See* U.S. CONST. art. II, § 2, cl. 2 (prescribing mechanisms for appointing "Officers of the United States" and giving Congress latitude with respect to "inferior Officers").

[124] Steven G. Calabresi & Kevin H. Rhodes, *The Structural Constitution: Unitary Executive, Plural Judiciary*, 105 HARV. L. REV. 1153, 1158 (1992). Professor Steven Calabresi and Kevin Rhodes go on, however, to describe three separate versions of unitary executive theory. *See id.* at 1166.

[125] *See, e.g.*, Ronald J. Krotoszynski, Jr., *Cooperative Federalism, The New Formalism, and The Separation of Powers Revisited:* Free Enterprise Fund *and the Problem of Presidential Oversight of State-Government Officers Enforcing Federal Law*, 61 DUKE L.J. 1599, 1607–08 (2012) (linking the two theories); Martin S. Flaherty, *The Most Dangerous Branch*, 105 YALE L.J. 1725, 1733–34 (1996) (same).

[126] *See, e.g.*, Lawrence Lessig & Cass R. Sunstein, *The President and the Administration*, 94 COLUM. L. REV. 1, 2–3 (1994) (offering functional rationales for a strong unitary executive).

[127] *See, e.g.*, Seila L. LLC v. Consumer Fin. Prot. Bureau, 140 S. Ct. 2183, 2192 (2020); Free Enter. Fund v. Pub. Co. Acct. Oversight Bd., 561 U.S. 477, 483 (2010).

that.[128] Instead, the Court generally has pursued an approach of recasting and minimizing its precedents to render them more compatible with the Court's preferred direction. But the Court also has been enormously creative at fixing agencies' constitutional infirmities while leaving the agencies otherwise intact to continue their work.

For example, in *Free Enterprise Fund v. Public Co. Accounting Oversight Board*,[129] the Roberts Court declared that two layers of statutory for-cause removal restrictions for members of the Public Company Accounting Oversight Board (PCAOB) violated separation of powers principles.[130] The Court resolved the constitutional difficulty, however, by simply severing one of the two statutory provisions and remanding the case for reconsideration by a now-constitutional agency.[131] The accounting firm that challenged the PCAOB's structure won its case before the Supreme Court, but its disagreement with the agency persisted for several months until the parties settled with the agency closing its investigation but reserving the authority to pursue future investigations of the accounting firm's "past or future conduct."[132]

In each of *Seila Law v. Consumer Financial Protection Bureau*[133] and *Collins v. Yellen*,[134] the Roberts Court held that an independent agency headed by a single director — in *Seila Law*, the Consumer Financial Protection Bureau (CFPB); in *Collins*, the Federal Housing Finance Agency — violated separation of powers principles.[135] Again, however, the Roberts Court resolved the agencies' structural problems with at best minimal interference.[136] Given the presence of complicating factors in *Collins*, the Court remanded that case for the lower courts to decide what the remedy for the constitutional violation should be.[137] In *Seila Law*, however, the Court again simply severed a statutory for-cause removal restriction, rendering the CFPB's Director removable at will by the President and the agency no longer independent. The Court in *Seila Law* declined to dismiss outright the matter that gave rise to the case in the first instance, a civil investigative demand issued by the CFPB seeking documents and other information from Seila Law.[138]

[128] *See, e.g.*, *Seila L.*, 140 S. Ct. at 2211–12 (Thomas, J., concurring); Lucia v. SEC, 138 S. Ct. 2044, 2056–57 (2018) (Thomas, J., concurring).

[129] 561 U.S. 477 (2010).

[130] *Id.* at 492.

[131] *Id.* at 508.

[132] Michael Cohn, *Beckstead and Watts Settles Inspection Case with PCAOB*, ACCT. TODAY (Feb. 23, 2011, 2:32 PM), https://www.accountingtoday.com/news/beckstead-and-watts-settles-inspection-case-with-pcaob [https://perma.cc/57CD-PHNH].

[133] 140 S. Ct. 2183 (2020).

[134] 141 S. Ct. 1761 (2021).

[135] *Id.* at 1783–84; *Seila L.*, 140 S. Ct. at 2197.

[136] *See* Jonathan H. Adler, *Conservative Minimalism and the Consumer Financial Protection Bureau*, U. CHI. L. REV. ONLINE (Aug. 27, 2020), https://lawreviewblog.uchicago.edu/2020/08/27/seila-adler [https://perma.cc/V9WY-E6VZ] (observing similarly).

[137] *Collins*, 141 S. Ct. at 1788–89.

[138] *Seila L.*, 140 S. Ct. at 2221.

Instead, the Court remanded the case, after which the Ninth Circuit decided that the CFPB's demand was properly ratified later by a constitutionally accountable Director.[139] In other words, although Seila Law won its case before the Supreme Court and the CFPB's structure was altered to make its Director removable at will, the CFPB's performance of its statutory functions — including its investigation of Seila Law — continued unabated.

Finally, *United States v. Arthrex, Inc.*[140] ended with the Roberts Court using severability a little differently to align an agency's structure more closely with unitary executive theory while simultaneously minimizing the impact on the agency's performance of its statutory functions. In *Arthrex*, the Court determined that the Patent Trial and Appeal Board (PTAB) was unconstitutionally structured because administrative patent judges (APJs) made final decisions that no one else in the executive branch, including the Director of the Patent and Trademark Office, could review and overturn.[141] The obvious conclusion from the Court's analysis was that the APJs were principal officers who must be appointed by the President with the advice and consent of the Senate. The Court avoided that holding, however, on the ground that it was enough to say that "[o]nly an officer properly appointed to a principal office may issue a final decision binding the Executive Branch in the proceeding before us."[142] The Court then severed language in the statute preventing the Director from reviewing and overturning PTAB decisions, thus giving the Director sufficient supervisory authority over APJs to satisfy constitutional requirements by making APJs inferior officers, and otherwise allowing the PTAB to continue its work.[143]

In other work, I have questioned whether the Roberts Court's willingness to use severability to rewrite statutory text is as restrained as might appear at first blush.[144] Nevertheless, one cannot help but notice that, with those small statutory adjustments, the Roberts Court allowed the agencies in question to proceed in the day-to-day administration of their statutory responsibilities with nary a hiccup.

III. What Happens Next?

Along with the Roberts Court's other administrative law cases, the Quartet brings some amount of change, but not the radical overhaul that some demand and others decry. Indeed, notwithstanding its trend

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139 Consumer Fin. Prot. Bureau v. Seila L. LLC, 984 F.3d 715, 719–20 (9th Cir. 2020), *amended and superseded on denial of reh'g en banc*, 997 F.3d 837 (9th Cir. 2021).

140 141 S. Ct. 1970 (2021).

141 *Id.* at 1980–85.

142 *Id.* at 1985.

143 *Id.* at 1986–87.

144 Kristin E. Hickman, *Symbolism and Separation of Powers in Agency Design*, 93 NOTRE DAME L. REV. 1475, 1488–93 (2018).

toward greater structural formalism, the Roberts Court seems quite determined not to interfere too much with the overall functionality of the administrative state. Obviously, these decisions are dissatisfying to supporters of administrative governance and advocates of the policies advanced by the invalidated regulatory actions. They are also frustrating to critics of administrative governance who want more sweeping change.

The limitations of and omissions from the Quartet's reasoning bring some amount of uncertainty regarding how to apply the major questions doctrine. Uncertainty leads to inconsistency.[145] Some highly motivated judges will undoubtedly overread the Quartet, just as they will the Roberts Court's other administrative law opinions, and push for more change than the Court has embraced. Other judges likely will underread the Court's opinions and not apply them aggressively enough for the Court.

We also have not seen the last of the Roberts Court in any of these areas. Small changes in the short term are not incompatible with more significant ones later, nor with substantial upheaval over time. Today's incremental moves could become tomorrow's major alterations in the functionality of the administrative state. Of course, if the Court is deliberately pursuing major change on an incremental basis, the passage of time makes the possibility of reaching the end goal (whatever it may be) less likely as political and personnel changes occur.

One suspects the Court lacks the votes for grander doctrinal pronouncements, but we cannot know with certainty whether the Roberts Court's incrementalism regarding separation of powers and agency action arises from genuine disagreement over how far doctrinal change should go or merely how best to get to a particular objective. The Court still could replace the intelligible principle standard,[146] repudiate *Chevron* deference,[147] and invalidate the very existence of some number

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[145] For that matter, the Court's opinions in the Quartet arguably are not entirely consistent with one another. *See, e.g.*, Adler, *supra* note 112, at 54 (contending that the Roberts Court's approach to the major questions doctrine in *Alabama Ass'n of Realtors* is different from that in *NFIB v. Department of Labor* and *West Virginia v. EPA*).

[146] *But see* Alan B. Morrison, *The Supreme Court's Non-delegation Tease*, YALE J. ON REGUL.: NOTICE & COMMENT (July 29, 2020), https://www.yalejreg.com/nc/the-supreme-courts-non-delegation-tease-by-alan-b-morrison [https://perma.cc/XA4T-TH8T] (documenting two post-*Gundy* cases presenting nondelegation issues in which the Supreme Court denied certiorari).

[147] The Supreme Court denied certiorari in two cases that commenters anticipated might be vehicles for substantially curtailing *Chevron* deference if not overruling it outright in the 2022 Term: *Buffington v. McDonough*, 7 F.4th 1361 (Fed. Cir. 2021), *cert. denied*, No. 21-972, 2022 WL 16726027 (U.S. Nov. 7, 2022); and *Aposhian v. Barr*, 958 F.3d 969 (10th Cir. 2020), *cert. denied sub nom. Aposhian v. Garland*, 91 U.S.L.W. 3061 (U.S. Oct. 3, 2022) (No. 21-159). *See* Jeff Overley, Chevron *Deference Still Feels Heat After High Court Reprieve*, LAW360 (June 16, 2022, 10:56 PM), https://www.law360.com/articles/1503671/chevron-deference-still-feels-heat-after-high-court-reprieve [https://perma.cc/UBG9-Z989] (discussing the *Buffington* and *Aposhian* cases).

of government agencies[148] — thus reducing the ability of Congress to rely on agencies to accomplish policy priorities more than the Court has thus far. In the meantime, by shifting doctrine incrementally on a case-by-case basis without doing a more thorough job of explaining and justifying those moves and where they might be headed, the Roberts Court may run the risk of painting itself into a corner that it does not like and from which it has a hard time escaping.

Nevertheless, expecting the Roberts Court simply to maintain the doctrinal status quo despite changing times and Court personnel is ahistorical. With any movement in judicial doctrine, whether great or small, some amount of uncertainty and a whole lot of criticism will be inevitable, no matter how long and how thorough the Court makes its opinions. The real question all along has been how much change, not whether any would occur. At least for now, on administrative law issues, and as regards the day-to-day reality of administrative governance, that change is pretty limited.

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148 *See, e.g.*, Braidwood Mgmt. Inc. v. Becerra, No. 20-cv-00283, 2022 WL 4091215, at *8–13 (N.D. Tex. Sept. 7, 2022) (holding that members of the Preventive Services Task Force at the Department of Health and Human Services were unconstitutionally appointed and that their decisions cannot be ratified by the Secretary).

ANTITRUST RULEMAKING: THE FTC'S DELEGATION DEFICIT

THOMAS W. MERRILL*

The Federal Trade Commission's (FTC's) recent assertion of authority to engage in legislative rulemaking in antitrust matters can be addressed in terms of three frameworks: the major questions doctrine, the Chevron doctrine, and as a matter of ordinary statutory interpretation. The article argues that as a matter of ordinary statutory interpretation the FTC has no such authority. This can be seen by considering the structure and history of the Act and is confirmed by the 1975 Federal Trade Commission Improvements Act. Given that the result follows from ordinary statutory interpretation, it is unnecessary for courts to consider the other two frameworks.

* Charles Evans Hughes Professor, Columbia Law School. The article has benefitted from comments from participants at workshops on FTC rulemaking sponsored by the George Mason Antonin Scalia School of Law in 2022 and the Brigham Young School of Law in 2023. Kyle Oefelein provided excellent research assistance. Research support was provided by the Gray Center of the Study of Administrative Law at George Mason University.

INTRODUCTION

The leadership installed at the Federal Trade Commission (FTC or the Commission) by the Biden Administration would like to use legislative rulemaking to regulate anti-competitive practices.[1] The Commission Chair, Lina Khan, has argued that the traditional method used by the FTC and the courts to enforce the antitrust laws—adjudication—"generates ambiguity, unduly drains resources from enforcers, and deprives individuals and firms of any real opportunity to democratically participate in the process."[2] Legislative rulemaking would reverse these deficiencies; that is, it would reduce ambiguity about what is or is not permitted, conserve the resources of enforcers, and permit affected individuals and firms to participate in the process of formulating rules. The FTC made good on this aspiration on January 5, 2023, by issuing a notice of proposed rulemaking that, in the interest of enhancing competition among firms for workers, would make so-called non-compete clauses in employment contracts illegal.[3]

This Article will not focus on whether such rulemaking would be a good idea in determining what sorts of behavior are prohibited by the antitrust laws. That question, this Article argues, is essentially moot because the FTC has no legal authority to engage in legislative rulemaking on competition matters.

The question of the FTC's authority in this context has important implications for the future of the regulatory state. The FTC will argue that a provision allowing it to make "rules and regulations" tucked away in its 1914 organic act authorizes it to make legislative rules about unfair competition.[4] After all, the provision does not clearly say that legislative rules are *not* included in the phrase "rules and regulations," and courts have often assumed that similar language includes the authority to make legally binding rules.[5] Indeed,

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1. *See generally* FED. TRADE COMM'N (FTC), STATEMENT OF REGULATORY POLICIES, (2021), https://www.reginfo.gov/public/jsp/eAgenda/StaticContent/202110/Statement_3084_FTC.pdf.

2. Rohit Chopra & Lina M. Khan, *The Case for "Unfair Methods of Competition" Rulemaking*, 87 U. CHI. L. REV. 357, 359 (2020).

3. *See* Non-Compete Clause Rule, 88 Fed. Reg. 3,482 (proposed Jan. 19, 2023) (to be codified at 16 C.F.R. pt. 910); *FTC Proposes Rule to Ban Noncompete Clauses, Which Hurt Workers and Harm Competition*, FED. TRADE COMM'N (Jan. 5, 2023), https://www.ftc.gov/news-events/news/press-releases/2023/01/ftc-proposes-rule-ban-noncompete-clauses-which-hurt-workers-harm-competition; Noam Scheiber, *U.S. Moves to Bar Noncompete Agreements in Labor Contracts*, N.Y. TIMES (Jan. 6, 2023), https://www.nytimes.com/2023/01/05/business/economy/ftc-noncompete.html.

4. Federal Trade Commission Act (FTC Act or the Act), Pub. L. No. 63-203, § 6(g), 38 Stat. 717, 722 (1914) (codified at 15 U.S.C. § 46(g)).

5. Two recent examples from the Supreme Court: In *Biden v. Missouri*, the Court refused to

the D.C. Circuit so held with respect to the FTC's rulemaking grant many years ago.[6] And even if one regards the rulemaking grant as ambiguous, the Commission can point out that as recently as 2013 the Supreme Court held that agencies are entitled to *Chevron* deference with respect to interpretations of ambiguities about the scope of their own authority.[7]

Other aspects of the question, however, suggest that the FTC will encounter choppy waters. The Supreme Court has recently embraced something called the "major questions" doctrine, most prominently in *West Virginia v. EPA*.[8] Much about the doctrine remains uncertain, but it takes little imagination to predict that opponents of antitrust rulemaking will claim that the Commission's authority to make such rules is a major question, and thus, the commission must be able to point to "clear congressional authorization" before it goes down this path.[9]

There is a more general problem: The Supreme Court seems to have lost all enthusiasm for deferring to agency interpretations of the law they administer. The Court has not applied the *Chevron* doctrine to resolve a question of agency law since 2016.[10] In the most recent full Term, it was barely mentioned. Instead, the Court has taken to resolving questions of agency law de novo, whether the result happens to be to affirm or reverse the

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stay a regulation issued by the Department of Health and Human Services (HHS) requiring that all employees in facilities funded by Medicare and Medicaid be vaccinated against the COVID-19 virus. 142 S. Ct. 647 (2022). The majority was unmoved by the dissenters' argument that HHS could point to no statute authorizing such regulations. *Id.* at 655–58 (Thomas, J., dissenting) (noting that HHS relied on a provision authorizing regulations required for the "efficient administration" of the FTC Act). It was enough, according to the majority, that HHS had imposed similar restrictions in the past. *Id.* at 652. In *West Virginia v. EPA*, the Court, without analysis of the relevant text, assumed that the Environmental Protection Agency (EPA) has authority under the Clean Air Act (CAA) to promulgate legislative regulations setting emissions standards for existing sources of air pollution. 142 S. Ct. 2587, 2601–02 (2022). The relevant text, § 111(d) of the CAA, appears to delegate authority to EPA to promulgate only *procedural* regulations governing the manner in which states submit proposed emissions limits on existing sources. *Compare* CAA § 111(b)(2), 42 U.S.C. § 7411(b)(2) (new sources), *with* § 111(d), 42 U.S.C. § 7411(d)(1) (existing sources). *See* Tom Merrill, West Virginia v. EPA: *Getting to Actual Delegation*, VOLOKH CONSPIRACY (July 29, 2022, 7:10 AM), https://reason.com/volokh/2022/07/29/west-virginia-v-epa-getting-to-actual-delegation/.

6. *See* Nat'l Petroleum Refiners Ass'n v. Fed. Trade Comm'n (FTC), 482 F.2d. 672 (D.C. Cir. 1973), *rev'g* 340 F. Supp. 1343 (D.D.C. 1972).

7. *See* City of Arlington v. FCC, 569 U.S. 290 (2013).

8. 142 S. Ct. 2587, 2609–10 (2022).

9. *Id.* at 2609.

10. The last time the Court applied the two-step standard of review associated with *Chevron* was in *Cuozzo Speed Technologies, LLC v. Lee*, 579 U.S. 261, 276–77 (2016).

agency position. A particularly pertinent example is *AMG Capital Management v. FTC*,[11] where the Court held that the FTC does not have statutory authority to bring original civil actions in federal court seeking restitution for consumers who have been victims of deceptive practices.[12] The Court reached this result by reviewing the structure of the Federal Trade Commission Act of 1914 (FTC Act or the Act) and its historical evolution over time.[13] The Article will argue in Part III that a similar conclusion can be reached about antitrust rulemaking by tracing the history of the FTC's authority to engage in rulemaking. Such a decision would obviate any need either to defer to the FTC's interpretation, or to trot out the heavy artillery of the major questions doctrine.

In what follows, the Article will discuss the question of the FTC's rulemaking authority in competition matters from three perspectives. Part I will consider how the issue should be resolved under the newly minted major questions doctrine. Part II will address how the matter might be resolved under the *Chevron* doctrine, as it came to be regarded in its most expansive form, with the decision in *City of Arlington v. FCC*.[14] Part III will examine how the issue should be resolved as a matter of ordinary statutory interpretation. The last framing is the correct one, the Article argues, because courts should always determine as a matter of independent judgment whether an agency is acting within the scope of its delegated regulatory authority.[15] But the major questions frame and the *Chevron* doctrine are likely to be invoked if the matter becomes contested in litigation. So, for the sake of completeness, the Article will address all three ways of viewing the question.

I. IS FTC RULEMAKING AUTHORITY A MAJOR QUESTION?

The Supreme Court Term that ended in the summer of 2022 will be remembered for, among other things, the Court's endorsement of something called the major questions doctrine.[16] There are many uncertainties about this doctrine and how it will be deployed in the future. A rough statement of the doctrine is that courts will not uphold

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11. 141 S. Ct. 1341 (2021).

12. *Id.* at 1344.

13. *See id.* at 1345–49.

14. 569 U.S. 290 (2013).

15. *See* THOMAS W. MERRILL, THE *CHEVRON* DOCTRINE: ITS RISE AND FALL, AND THE FUTURE OF THE ADMINISTRATIVE STATE 230–37, 263 (2022) [hereinafter MERRILL, *CHEVRON* DOCTRINE].

16. *See* West Virginia v. EPA, 142 S. Ct. 2587, 2609 (2022).

novel agency interpretations that seek to regulate questions of economic and political significance unless the agency can point to clear congressional authorization for such actions.[17]

The major questions doctrine did not come out of nowhere. The Court has episodically expressed skepticism about agency assertions of "significant policymaking authority" in an unprecedented fashion.[18] For example, in 2000, the Court held that the Food and Drug Administration (FDA) could not regulate tobacco products as ordinarily marketed based on its general authority to regulate drugs and devices.[19] Then, in 2014, the Court held that Environmental Protection Agency (EPA) could not subject stationary sources of air pollution to certain stringent regulations based on their emission of greenhouse gases since this would "bring about an enormous and transformative expansion in EPA's regulatory authority without clear congressional authorization."[20]

Until 2022, however, such expressions of skepticism had manifested themselves in the course of exercises in ordinary statutory interpretation, typically either as part of "step one" or "step two" of the *Chevron* doctrine.[21] The Court's expressions had the status of sayings or maxims, such as the often-quoted quip that Congress does not hide "elephants in mouseholes."[22] In contrast, in *National Federation of Independent Business (NFIB) v. OSHA*,[23] decided in January of 2022, and more emphatically in *West Virginia v. EPA*, decided in late June of that year, the Court reformulated these expressions of skepticism into a new canon of interpretation.[24]

Under this new doctrine, the obvious and generally dispositive question is what constitutes a major question. What do we learn from the recent decisions about this? Chief Justice Roberts's opinion for the Court in *West Virginia*, as is often his style, sought to ground the major questions doctrine in precedent. In so doing, the opinion includes quotations from a number of the Court's previous decisions.[25] Thus, we read that a major question exists when an agency offers a "novel reading" of a statute that would result in the "wholesale restructuring" of an industry; when it advances a claim of

17. *See id.* at 2614.
18. FDA v. Brown & Williamson Tobacco Corp., 529 U.S. 120, 160 (2000).
19. *Id.*
20. Util. Air Regul. Grp. v. EPA, 573 U.S. 302, 324 (2014).
21. Chevron U.S.A., Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837, 842–43 (1984).
22. Whitman v. Am. Trucking Ass'ns., 531 U.S. 457, 468 (2001).
23. 142 S. Ct. 661 (2022) (per curiam).
24. West Virginia v. EPA, 142 S. Ct. 2587, 2609, 2614 (2022).
25. *Id.* at 2605, 2608–10 (citations omitted).

"sweeping and consequential authority" based on a "cryptic" statutory provision; when it entails "unheralded" regulatory power over "a significant portion of the American economy;" when it invokes "oblique or elliptical language" to make a "radical or fundamental change" in a regulatory scheme; or when it cites an "ancillary provision" to "adopt a regulatory program that Congress had conspicuously and repeatedly declined to enact itself."[26] It is hazardous to attempt to distill a more precise formulation of what constitutes a major question based on this collection of quotations. The root idea of the Court's opinion, however, is that a major question is one in which an agency advances a novel interpretation of its statutory authority that has the effect of significantly changing the scope of its authority.

Justice Gorsuch, in a concurring opinion in *West Virginia* joined by Justice Alito, sought to provide a crisper formulation of the meaning of major question.[27] He discerned three inquiries that provide "a good deal of guidance" in this regard.[28] First, does the "agency claim[] the power to resolve a matter of great 'political significance,'" such as one in which Congress has considered and rejected in "bills authorizing something akin to the agency's proposed course of action?"[29] Second, does the agency seek to regulate "a significant portion of the American economy" or does its action implicate "billions of dollars in spending" by private persons or entities?[30] Third, does the "agency seek to 'intrud[e] into an area that is the particular domain of state law'" thus implicating considerations of federalism?[31] Whether this exegesis provides better guidance is a matter of opinion. The first two inquiries are compounds of two separate factors (e.g., political controversy and prior rejection by Congress), so arguably Justice Gorsuch has posited five factors rather than three. And the Justice added that his list of "triggers" "may not be exclusive."[32]

Justice Gorsuch's concurrence further complicates things by offering an exegesis about what qualifies as a clear statement of congressional authorization in this context. Here, as one would expect, we read that "oblique and elliptical language," "gap filler" provisions, and "broad and unusual authority" do not count as clear statements.[33] But we also read that novel interpretations of old

26. *Id.* (citations omitted).
27. *Id.* at 2616, 2620–21 (Gorsuch, J., concurring).
28. *Id.* at 2620.
29. *Id.* at 2620–21.
30. *Id.* at 2621.
31. *Id.*
32. *Id.*
33. *Id.* at 2622–23.

statutes, interpretations by an agency that are not contemporaneous with enactment of the statute or of longstanding duration, and interpretations that reflect a "mismatch between an agency's challenged action and its congressionally assigned mission and expertise" may not count.[34] These latter circumstances suggest a concern about the novelty or lack of precedent for the agency interpretation or what political scientists call policy drift, all of which seem to go to problems associated with the nature of the agency decision, not to whether Congress has supplied the requisite clear authorization. So maybe the concurrence posits eight factors, rather than three or five.

Without regard to how one tallies up the factors, the determination of whether something is a major question apparently entails a multi-factorial inquiry. And the various factors cannot be reduced to a common metric. The impression one gets is that the concept of major questions is grounded in an intuitive mix of considerations of the "know it when you see it" variety.[35]

In terms of the future path of development, there are some intriguing differences between the description of the major questions doctrine in Chief Justice Roberts's opinion for the Court in *West Virginia* and Justice Gorsuch's concurring opinions in *NFIB* and *West Virginia*.[36] Justice Gorsuch, who appears to be the most enthusiastic proponent of the new doctrine, describes the major questions doctrine as a "clear-statement rule[]."[37] Chief Justice Roberts, however, never uses this expression in the portions of his *West Virginia* opinion setting forth his understanding of the doctrine. Instead, he speaks of the requirement of "clear authorization" by Congress which might include, for example, implicit ratification of the agency position by subsequent legislative action.[38] Perhaps even more strikingly, Justice Gorsuch grounds the doctrine in constitutional law, namely the nondelegation doctrine that posits Congress has the exclusive power to legislate and may delegate authority to executive actors

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34. *Id.* at 2623.

35. *See* U.S. Telecom Ass'n v. FCC, 855 F.3d 381, 423 (D.C. Cir. 2017) (per curiam) (Kavanaugh, J., dissenting from denial of rehearing en banc) (acknowledging that the major questions canon has a "'know it when you see it' quality").

36. *Compare West Virginia*, 142 S. Ct. at 2609 (describing the major questions doctrine as "agencies asserting highly consequential power beyond what Congress could reasonably understood to have granted"), *with* Nat'l Fed'n of Indep. Bus. (NFIB) v. OSHA, 142 S. Ct. 661, 667–70 (2022) (per curiam) (Gorsuch, J., concurring) (describing the major questions doctrine as one that requires Congress to "speak clearly" when delegating authority to agencies on issues of "vast economic and political significance") (quoting Ala. Ass'n of Realtors v. HHS, 141 S. Ct. 2485, 2489 (2021) (per curiam)) (internal quotations omitted)), *and West Virginia*, 142 S. Ct. at 2616–17, 2620–24 (Gorsuch, J., concurring) (outlining the applicability of the major questions doctrine).

37. *West Virginia*, 142 S. Ct. at 2616 (Gorsuch, J., concurring).

38. *Id.* at 2609, 2614 (majority opinion).

only on minor or interstitial matters of implementation of legislative policy.[39] The Chief Justice, in contrast, locates the doctrine almost entirely in what can be called administrative common law.[40] A third difference is that the Chief Justice appears to incorporate something like the "swerve doctrine" into the major questions idea, emphasizing that prior opinions have identified major questions as being "unprecedented," "unheralded," or based on a "novel reading" of statutory authority.[41] Justice Gorsuch does not mention this in his recitation of the elements that may qualify a question as being "major," although he describes agency inconsistency as a factor to be considered in determining whether the agency action is supported by a clear statement from Congress.[42]

How these differences are resolved in the future will have an important bearing on whether the major questions doctrine portends a revolution in administrative law or merely adds one more substantive canon to the proliferating list of canons collected in treatises on statutory interpretation.[43] This Article leaves for another day a more systematic critique of the new doctrine. For present purposes, all that can be said is that it is unclear how the major questions doctrine would apply to a claim by the FTC of antitrust rulemaking authority.

Many of the factors that help make something a major question, as enumerated by the Chief Justice and Justice Gorsuch, clearly suggest that the FTC's proposed ban on non-compete agreements is a major question. The

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39. *Compare* Gundy v. United States, 139 S. Ct. 2116, 2123 (2019) (reaffirming the traditional test permitting the delegation of discretionary authority if constrained by an "intelligible principle"), *with West Virginia*, 142 S. Ct. at 2617–19 (Gorsuch, J., concurring) (insisting that delegations should be limited to filling the details in statutes with major questions resolved by Congress).

40. The Chief Justice made one brief reference to "separation of powers principles" without spelling out what they were. *West Virginia*, 142 S. Ct. at 2609. This was paired in the same sentence with "a practical understanding of legislative intent." *Id.*

41. *Id.* at 2605, 2608. The "swerve doctrine," like most administrative common law, originated in the D.C. Circuit. *See* Greater Bos. Television Corp. v. FCC, 444 F.2d 841, 852 (D.C. Cir. 1970) (stating that "an agency changing its course must supply a reasoned analysis indicating that prior policies and standards are being deliberately changed, not casually ignored, and if an agency glosses over or swerves from prior precedents without discussion it may cross the line from the tolerably terse to the intolerably mute."). For endorsements of the idea by the Supreme Court, see Motor Vehicle Mfg. Ass'n of U.S. v. State Farm Mut. Auto. Ins., 463 U.S. 29 (1983); U.S. Dep't of Homeland Sec. v. Regents of Univ. of Cal., 140 S. Ct. 1891 (2020).

42. *See West Virginia*, 142 S. Ct. at 2623 (Gorsuch, J., concurring) (noting that a novel assertion of agency power "warrants a measure of skepticism") (quoting Util. Air Regul. Grp. v. EPA, 573 U.S. 302, 324 (2014)).

43. *See* ANTONIN SCALIA & BRYAN A. GARNER, READING LAW: THE INTERPRETATION OF LEGAL TEXTS 69–339 (2012) (discussing some fifty-one canons as guides to statutory interpretation).

proposed ban, according to the Notice of Proposed Rulemaking, would affect approximately thirty million workers and increase their earnings by $250 to $296 billion per year.[44] This would seem clearly to satisfy the large number of persons and large number of dollars referenced by the Court as signifying a major question. The issue would also appear to implicate questions of federalism, given that the permissibility of non-compete employment contracts has long been governed by state law, with some states (e.g., California) banning them, and others permitting them if they are reasonable.[45] The issue is likely to be politically controversial, at least with employers. But it does not appear that Congress has tried, and failed, to enact a similar nationwide ban. Other factors, however, cut less clearly in favor of characterizing the FTC's proposed rule.

One factor stressed by the Chief Justice in his opinion for the Court in *West Virginia* is the swerve idea: a question is likely to be major if the agency action is unprecedented, unheralded, novel, or inconsistent with past agency understanding.[46] This also appears in the per curiam opinion for the Court in *NFIB*,[47] and in Justice Gorsuch's discussion of what constitutes a clear statement in *West Virginia*.[48]

In one sense, the FTC's claim of legislative rulemaking power can be viewed as an avulse change. For more than a century, the FTC has never engaged in legislative rulemaking in a matter that unambiguously involves its antitrust authority. On the other hand, the FTC's claim that the source of this authority is § 6(g) of the FTC Act (discussed more fully in Part III), is not a bolt from the blue.[49] The Commission asserted this interpretation of § 6(g) in the late 1960s, and its claim was upheld by the D.C. Circuit in *National Petroleum Refiners Ass'n v. FTC*[50] in 1973. There is more to say about this decision (which is also covered in Part III). The point for present purposes is that the FTC's claim for legislative rulemaking authority based on § 6(g) has

44. Non-Compete Clause Rule, 88 Fed. Reg. 3,482, 3,482, 3,485, 3,501 (proposed Jan. 19, 2023) (to be codified at 16 C.F.R. pt. 910).

45. *Id.* at 3,482, 3,493–94 (discussing variations in state statutory and common law). The RESTATEMENT (SECOND) OF CONTRACTS: ANCILLARY RESTRAINTS ON COMPETITION § 188 (AM. L. INST. 1981) provides that non-compete agreements are unreasonable if the restraint is greater than needed to protect the employer's legitimate interest or the employer's need is outweighed by the hardship to the employee and the likely injury to the public.

46. *See supra* note 41 and accompanying text.

47. *See* NFIB v. OSHA, 142 S. Ct. 661, 665–66 (2022) (per curiam).

48. *See* West Virginia v. EPA, 142 S. Ct. 2587, 2623 (2022) (Gorsuch, J., concurring).

49. *See* FTC Act, Pub. L. No. 63-203, § 6(g), 38 Stat. 717, 722 (1914) (codified at 15 U.S.C. § 46(g)).

50. 482 F.2d 672 (D.C. Cir. 1973).

been around for more than half century. This authority has rarely been asserted, and virtually never in a purely antitrust context. But it is different in this respect from the Occupational Safety and Health Administration's (OSHA's) claim of authority to require the vaccination or periodic testing of all employees at all major firms throughout the country, which the Court said had never been asserted by OSHA in the fifty years of its existence.[51]

Another variable is whether the agency interpretation significantly changes the scope of its regulatory authority. A number of cases cited as precedents for the major questions doctrine involved debatable expansions or contractions of an agency's substantive regulatory authority.[52] *FDA v. Brown & Williamson Tobacco Corp.*,[53] described by the Chief Justice as the "leading case," is a clear example: the FDA, after decades of disclaiming any power to regulate tobacco products, discovered such authority based on a revised reading of its statutory mandate. Similarly, in *King v. Burwell*,[54] the government allowed persons to claim tax credits for health insurance purchased on a federally-created insurance exchange, even though the statute spoke of exchanges "established by a state."[55] The Court characterized the statute as "ambiguous," but declined to rest on the agency's interpretation.[56] Instead, it invoked the major questions doctrine and decided the matter itself in favor of the agency's position.[57]

What is unclear is whether the major questions doctrine is reserved for interpretations that implicate the scope of an agency's substantive regulatory authority, as in *Brown & Williamson* and *King v. Burwell*, or whether it also applies to the changes in the *method* of exercising that authority. The question of whether the FTC has rulemaking authority over competition matters does not affect the scope of its substantive regulatory authority. The FTC has been charged with enforcing the antitrust laws for more than a century. The Sherman Act was passed in 1890,[58] and the FTC has enforced the antitrust laws ever since the Clayton Act was adopted in 1914.[59] That authority,

51. *NFIB*, 142 S. Ct. at 666.

52. *See* FDA v. Brown & Williamson Tobacco Corp., 529 U.S. 120 (2000); King v. Burwell, 576 U.S. 473, 493–97 (2015).

53. 529 U.S. 120 (2000).

54. 576 U.S. 473 (2015).

55. *Id.* at 483.

56. *Id.* at 490.

57. *Id.* at 485–86.

58. Sherman Act, ch. 647, 26 Stat. 209 (1890) (codified as amended at 15 U.S.C. §§ 1–38 (2018)).

59. Clayton Act, ch. 323, 38 Stat. 730 (1914) (codified as amended at 15 U.S.C. §§ 12–27 (2018)). To be sure, the Commission's current position is that its authority over "unfair methods of competition" extends beyond the scope of conduct that violates the antitrust laws. *See* Federal

however, has always been exercised through case-by-case adjudication. The precise question, therefore, is whether the belated discovery of legislative rulemaking power as a means of supplementing a long-existing form of substantive regulatory authority also triggers the major questions doctrine.

The Court's limited jurisprudence of major questions points both ways. Consider *West Virginia*. At times the Chief Justice appears to say that the Obama Administration's Clean Power Plan (CPP) was a major question because it was designed to force utilities to enter into cap-and-trade systems in order to reduce carbon dioxide emissions, and this particular regulatory tool had not been clearly authorized by Congress under the relevant provision of the Clean Air Act.[60] This points toward the choice of method for achieving a regulatory goal as being included within the ambit of the major questions doctrine. At other times, the Chief Justice seems to say that the CPP was designed to force coal-burning plants out of business, transforming the nation's electric power industry into one based on renewables and natural gas rather than coal, and that this goal had not been authorized by Congress.[61] This points toward the major questions doctrine being concerned with the scope of regulatory authority.

Justice Gorsuch, in his concurring opinion in *West Virginia*, cited a late nineteenth-century decision holding that the Interstate Commerce Commission (ICC) could not prescribe rates for the future without a "clear and direct" authorization from Congress.[62] Rate prescription orders are a form of legislative rulemaking, as opposed to awards of reparations for unreasonable rates charged in the past, which are a type of adjudication.[63]

Trade Commission, Policy Statement Regarding the Scope of Unfair Methods of Competition Under § 5 of the Federal Trade Commission Act, Commission file No. P221202 at 1 (Nov. 10, 2022). The proposed rulemaking that would ban non-compete agreements in employment contracts, see Non-Compete Clause Rule, 88 Fed. Reg. 3,482 (proposed Jan. 19, 2023) (to be codified at 16 C.F.R. pt. 910), would appear to fall in this category since there is no allegation of collusion or monopolization as a basis for the proposed rule. The assertion of authority over "methods of competition" that the FTC deems "unfair" (but not violative of the antitrust law) combined with an assertion of authority to condemn such conduct by legislative rule is likely to enhance the judicial perception that the proposed action is a major question.

60. West Virginia v. EPA, 142 S. Ct. 2587, 2610–11 (2022).

61. *See id.* at 2610, 2612.

62. *Id.* at 2619 (Gorsuch, J., concurring) (citing and quoting Interstate Com. Comm'n (ICC) v. Cincinnati, New Orleans & Tex. Pac. Ry. Co., 167 U.S. 479, 505 (1897)).

63. *See* 5 U.S.C. § 551(4) (definition of "rule"); Arizona Grocery Co. v. Atchison, T. & S.F. Ry. Co., 284 U.S. 370, 383–89 (1932) (distinguishing rate prescription orders which have legislative effect from rates previously established by carriers that are subject to adjudication for reasonableness).

So *The Queen and Crescent Case*[64] is a close parallel to the question we are considering and suggests that the major questions doctrine applies to an agency interpretation discovering a new source of rulemaking authority.[65] But the Chief Justice in his opinion for the Court did not include the decision in his rendition of the precedents for the major questions doctrine.

The better view is that both agencies and reviewing courts "are bound, not only by the ultimate purposes Congress has selected, but by the means it has deemed appropriate, and prescribed, for the pursuit of those purposes."[66] This would seem to be required by the principle of legislative supremacy.[67] But this position does not answer the question whether a deviation from "the means" Congress has selected should be regarded as a major question, in all or even some cases. That remains unclear and may depend on other contextual factors.

Yet another factor, implicit in the majority decision in *West Virginia*, was labeled by the concurrence and Justice Kagan's dissent as "a mismatch between an agency's challenged action and its congressionally assigned mission and expertise."[68] The majority and the concurrence regarded the mismatch to be EPA's decision to balance "the many vital considerations of national policy implicated in deciding how Americans will get their energy."[69] EPA, in their view, was charged with controlling air pollution, not with formulating energy policy.[70] Justice Kagan demurred, finding "no misfit, of the kind apparent in our precedents, between the regulation, the agency, and the statutory design[.]"[71]

Whatever the correct conception of EPA's statutory mandate to deal with climate change, this variable would not seem to impeach the FTC's desire to engage in antitrust rulemaking. In this regard, consider that the FTC, in conjunction with the Antitrust Division of the Justice Department, has for many years promulgated the Merger Guidelines (the Guidelines), which FTC officials and Department of Justice (DOJ) officials use in opining on whether proposed mergers of companies should be allowed to go forward consistent with the antitrust laws.[72] The Guidelines are a policy

64. *Cincinnati, New Orleans, Tex. Pac. Ry. Co.*, 167 U.S. at 479. It was colloquially known as "The Queen and Crescent Case" because of the nicknames given to the principal cities—Cincinnati (the Queen City) and New Orleans (the Crescent City).

65. *Id.* at 498–99.

66. MCI Telecomms. Corp. v. AT&T Co., 512 U.S. 218, 231 n.4 (1994).

67. *See* MERRILL, *CHEVRON* DOCTRINE, *supra* note 15 at 195–216.

68. West Virginia v. EPA, 142 S. Ct. 2687, 2623 (Gorsuch, J., concurring).

69. *Id.* at 2612 (majority opinion).

70. *See id.* at 2611–12.

71. *Id.* at 2638 (Kagan, J., dissenting).

72. U.S. DEP'T OF JUST. & FED. TRADE COMM'N, HORIZONTAL MERGER GUIDELINES

statement, not a legislative rule.[73] They are used to predict how FTC and DOJ officials, as enforcement agents, regard a proposed merger, not to prohibit or permit particular mergers. But they are "rules" within the meaning of the Administrative Procedure Act (APA),[74] and they unquestionably have a significant impact on whether companies decide to proceed or abandon particular merger agreements. If officials of the FTC or the DOJ, applying the Guidelines, announce their opposition to a merger, the affected firms generally assume this will carry weight with the courts, which means that the merger is more likely to be disapproved.[75] Uncertainty about approval can be fatal to a merger, so many firms—faced with opposition of the FTC or DOJ—will abandon the merger.[76] Courts and lawyers are familiar with this dynamic, which means that the prospect of legislative rulemaking by the FTC on matters of antitrust law more generally may not strike them as some alien intrusion into the fabric of American public law.[77]

(2010), https://www.ftc.gov/sites/default/files/attachments/mergers/100819hmg.pdf.

73. Press Release, Federal Trade Commission, Federal Trade Commission and U.S. Department of Justice Issue Revised Horizontal Merger Guidelines (Aug. 19, 2010) ("The Horizontal Merger Guidelines . . . serve as an outline of the main analytical techniques, practices and enforcement policies the Department of Justice (DOJ) and the FTC use to evaluate mergers and acquisitions . . . .").

74. The Administrative Procedure Act (APA) defines "rule" to mean:

> [T]he whole or part of an agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy or describing the organization, procedure, or practice requirements of an agency and includes the approval or prescription for the future of rates, wages, corporate or financial structures or reorganizations thereof, prices, facilities, appliances, services, or allowances therefor or of valuations, costs, or accounting, or practices bearing on any of the foregoing.

5 U.S.C. § 551(4). Thus, interpretative rules and policy statements are rules, as are legislative rules, such as rules prescribing rates of utilities or regulated carriers.

75. *See* HERBERT HOVENKAMP, PRINCIPLES OF ANTITRUST 105 (2d ed. 2021) (noting in § 3.8 that courts have generally concurred with the judgments of the FTC and DOJ based on the Merger Guidelines).

76. *See, e.g.*, William E. Kovacic, *The Modern Evolution of U.S. Competition Policy Enforcement Norms*, 71 ANTITRUST J. 377, 435 (2003) (noting that the merger guidelines are the "most significant contribution by the federal agencies to non-criminal competition policy analysis in the modern era" and have "changed the way the U.S. courts and enforcement agencies examine mergers").

77. *See* D. Daniel Sokol, Marissa Ginn, Robert J. Calzaretta, Jr. & Marcello Santana, *Antitrust Mergers and Regulatory Uncertainty* (Dec. 6, 2022) (unpublished manuscript), https:ssrn.com/abstract=4295283 (reporting on an empirical survey of how lawyers have changed their advice to clients in response to uncertainty created by the failure of the FTC and DOJ to propose new merger guidelines).

In sum, many of the factors cited in the recent decisions about what constitutes a major question, such as the large numbers of persons and dollars implicated by the agency decision clearly point to the proposed rule as being a major question. Other factors, such as the novelty of the agency interpretation or whether a change in the methods of enforcement can count as a major question, could be resolved either way. A final factor, whether there is a mismatch between the agency's basic mission and the assertion of agency authority, seemingly counts against characterizing the claim of rulemaking authority in competition matters as a major question. On balance, my view is that the issue should not be classified as a major question, but that is surely debatable, given the uncertain scope of the doctrine. Opponents of antitrust rulemaking will certainly claim that it is.[78] Because the question can be resolved as a matter of ordinary statutory interpretation, as discussed in Part III, courts should resist the temptation to invoke the major questions doctrine in resolving it. In other words, they should avoid using the new form of constitutional avoidance, if that is what it is.

II. FTC RULEMAKING AUTHORITY AS A MATTER OF *CHEVRON* DEFERENCE

If the major questions doctrine does not answer the question about the FTC's authority to engage in legislative rulemaking in competition matters, what does? Until recently, most administrative lawyers would answer "the *Chevron* doctrine."[79] That answer is no longer clear either. For some thirty years, *Chevron* served as the principal metric used by the Supreme Court in reviewing challenges to an agency's interpretation of the statute it administers.[80] The Court invoked the two-step standard of review in over 100 decisions, and occasionally rebuked lower courts for failing to apply it.[81] The Supreme Court essentially stopped using the *Chevron* doctrine in 2016,[82] and several Justices have taken to writing separate opinions

78. *See, e.g.*, Eugene Scalia, *The FTC's Breathtaking Power Grab*, WALL ST. J. (Jan. 12, 2023, 6:50 PM), https://www.wsj.com/articles/the-ftcs-breathtaking-power-grab-noncompete-agreements-rule-capital-investment-wage-gap-job-growth-compliance-11673546029.

79. So named for *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984).

80. *See generally* MERRILL, *CHEVRON* DOCTRINE, *supra* note 15.

81. *See* Kristin E. Hickman & Aaron L. Nielson, *Narrowing* Chevron*'s Domain*, 70 DUKE L.J. 931, 1000–04 (2021) (listing 107 Supreme Court decisions applying the *Chevron* doctrine between 1984 and 2019). For a decision reversing and remanding a lower court for failing to apply the *Chevron* doctrine, see, for example, Immigr. & Naturalization Serv. v. Aguirre-Aguirre, 526 U.S. 415, 424 (1999).

82. *See* Cuozzo Speed Techs., LLC v. Lee, 579 U.S. 261, 276–77 (2016) (invoking *Chevron*

arguing that it should be overruled or at least reconsidered.[83] The Court's latest Term is perhaps the most striking. The Court considered seven cases that involved a challenge to an agency's interpretation of its statute.[84] *Chevron* was not mentioned once in a controlling opinion and received only the most fleeting mention in two separate opinions.[85] Notwithstanding that many parties and amici filed briefs arguing that *Chevron* should be overruled or modified, and that these pleas were expressly addressed in oral argument in two cases.[86]

The Court's determination to leave *Chevron* unmentioned is particularly striking in *West Virginia v. EPA*. The emergence of the major questions doctrine clearly operates as a modification of *Chevron*. Indeed, it is a kind of reverse-*Chevron*. *Chevron* says if the statute is unclear, defer to the agency;[87] *West Virginia* says, if the question is major, do not defer to the agency unless the statute is clear.[88] But the Court did not offer a single word in any of its recent decisions about how to integrate the new major questions doctrine with the *Chevron* doctrine. Does the major questions doctrine function as a preliminary inquiry (a "step zero" or maybe "step minus one"), which cuts off further analysis if the authorization is not clear? Or does the major questions doctrine operate like a substantive canon of interpretation applied at step one of *Chevron*, which supports the conclusion that the statute has a clear meaning contrary to the meaning urged by the agency? Or is the major questions doctrine analogous to the *Mead* doctrine, determining that the

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in deferring to agency's interpretation of the standard of review on inter partes patent appeal).

83. *See* Michigan v. EPA, 576 U.S. 743, 761–64 (2015) (Thomas, J., concurring) (noting that EPA's "request for deference raises serious questions about the constitutionality of our broader practice of deferring to agency interpretations of federal statutes"); Buffington v. McDonough, 143 S. Ct. 14, 22 (Nov. 7, 2022) (cert. denied) (Gorsuch, J., dissenting) ("We should acknowledge forthrightly that *Chevron* did not undo, and could not have undone, the judicial duty to provide an independent judgment of the law's meaning in the cases that come before the Nation's courts."); Brett M. Kavanaugh, *Fixing Statutory Interpretation*, 129 HARV. L. REV. 2118, 2118 (2016) (reviewing ROBERT A. KATZMANN, JUDGING STATUTES (2014)) (noting *Chevron* analysis depends on "an initial determination of whether a text is clear or ambiguous[,]" which judges often cannot make "in a settled, principled, or evenhanded way.").

84. Gary Lawson, *"Mostly Dead": Chevron's Shade* (forthcoming) (on file with author).

85. West Virginia v. EPA, 142 S. Ct. 2587, 2635 (2022) (Kagan, J., dissenting); Becerra v. Empire Health Found., 142 S. Ct. 2354, 2368 (2022) (Kavanaugh, J., dissenting).

86. Transcript of Oral Argument at 52–53, Becerra v. Empire Health Found., 142 S. Ct. 2354 (2022) (No. 20-1312); Transcript of Oral Argument at 30–35, Am. Hosp. Ass'n v. Becerra, 142 S. Ct. 1896 (2022) (No. 20-1114).

87. Chevron U.S.A., Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837, 843–44 (1984).

88. *West Virginia*, 142 S. Ct. at 2608–09.

agency is not entitled to *Chevron*-style deference but only respectful consideration under *Skidmore*?[89] Or perhaps no deference at all?

The matter is further clouded by the Court's recent practice, during what can be called the "*Chevron* moratorium," of deciding all questions of statutory interpretation that arise on review of agency action de novo, without giving any consideration one way or another to the agency's view. The practice has been followed by all Justices, liberal and conservative alike, and sometimes results in upholding the agency and sometimes in reversing it.[90] The simple explanation for this development is that the Court is deeply divided about what to do about *Chevron*, and all Justices have tacitly agreed to ignore the doctrine until some kind of consensus emerges about the path forward. But it is also conceivable that the Justices have tacitly agreed to replace *Chevron* with de novo review, i.e., overrule it, but cannot decide how to handle the embarrassment that the Court itself applied *Chevron* in over 100 cases. The possibility that the Court has opted for de novo review in every case would ignore the critical fact that it is possible for the Justices, who decide only about seventy cases per Term, to dig into the details of complex regulatory statutes and decide the matter de novo; it is far more difficult for lower court judges, who have much heavier caseloads, to function without some kind of deference doctrine.[91]

What is a lower court judge supposed to do in this puzzling situation? Perhaps the most obvious course of action is to ask, first, if the question is major or minor in light of the multiple factors listed by the Court. If major, the agency loses, and the matter is effectively sent back to Congress for possible resolution. If minor, the *Chevron* doctrine applies, as the Court explicated through 2016. On the assumption that the question of the FTC's antitrust rulemaking authority is not a major question, as discussed in Part I, how then should the matter be resolved under the Court's explication of the *Chevron* doctrine as of 2016?

As detailed in *The* Chevron *Doctrine: Its Rise and Fall, and the Future of the Administrative State*,[92] the *Chevron* doctrine has undergone significant

89. *See* United States v. Mead Corp., 533 U.S. 218 (2001). *Mead* effectively made *Skidmore v. Swift & Co.*, 323 U.S. 134 (1944), which requires giving agency interpretations of statutes respectful consideration but does not make them binding, the general default standard of review, with *Chevron* reserved for cases in which the agency is exercising delegated authority to make binding rules or decisions.

90. *See Am. Hosp. Ass'n*, 142 S. Ct. at 1902–06 (striking down agency interpretation of complex Medicare reimbursement provision without mentioning *Chevron*); *Empire Health Found.*, 142 S. Ct. at 2358, 2361–67 (upholding agency interpretation of complex Medicare reimbursement provision without mentioning *Chevron*).

91. *See* Nicholas R. Bednar & Kristin E. Hickman, Chevron*'s Inevitability*, 85 GEO. WASH. L. REV. 1392, 1395–1398, 1415, 1443 (2017).

92. *See* MERRILL, *CHEVRON* DOCTRINE, *supra* note 15.

revision over its thirty-plus-year life span. What follows is a highly abbreviated version of the history most relevant to the question of whether the FTC has antitrust rulemaking authority.

In its classical formulation, the *Chevron* doctrine was understood to require courts to accept reasonable agency interpretations of ambiguities in the statutes they administer. The Court narrowed the doctrine in *United States v. Mead Corp.*,[93] holding that the agency must act with the "force of law" in order to be eligible for *Chevron* deference, as opposed to some lesser degree of deference like *Skidmore*.[94] The Court was unclear about what sorts of agency decisions should be regarded as having the force of law, but legislative rulemaking and binding adjudication were implicitly regarded as the core cases.[95] The pattern of later decisions applying *Mead* is consistent with this understanding.[96] Justice Scalia filed the only dissent in *Mead*, arguing that *Chevron* should apply whenever the agency has offered an "authoritative" interpretation of the statute it administers, as when the agency files an amicus brief endorsed by the head of the agency or its general counsel.[97] Justice Scalia continued in later cases to condemn *Mead* and its "force of law" requirement.[98]

In 2013, the Court agreed to decide an issue that had divided the Justices early in the *Chevron* era and had produced a split in the circuits: whether *Chevron* should apply to an agency interpretation that implicates the scope of the agency's "jurisdiction."[99] Justice Scalia had staked out the position in 1988 that *Chevron* should apply to "jurisdictional" questions, because there is no meaningful distinction between jurisdictional and nonjurisdictional questions in the agency context.[100] When the issue came back to the Court twenty-five years later, Justice Scalia was able to command a bare majority for this position.[101] The distinction between jurisdictional and nonjurisdictional decisions was meaningless in the administrative context, he wrote for the Court, because all statutory limits on agency authority, if violated, make the

93. 533 U.S. 218 (2001).

94. *Id.* at 226–27.

95. *Id.* at 226–27, 230.

96. MERRILL, *CHEVRON* DOCTRINE, *supra* note 15, at 137–41 (discussing post-*Mead* decisions).

97. *Mead*, 533 U.S. at 239 (Scalia, J., dissenting).

98. MERRILL, *CHEVRON* DOCTRINE, *supra* note 15, at 138–41.

99. City of Arlington v. FCC, 569 U.S. 290, 293 (2013).

100. Miss. Power & Light Co. v. Mississippi *ex rel.* Moore, 487 U.S. 354, 377, 381–82 (1988) (Scalia, J., concurring).

101. *See generally* City of Arlington v. FCC, 569 U.S. 290 (2013) (Justice Scalia was joined by Justices Thomas, Ginsburg, Sotomayor, and Kagan.).

agency action ultra vires.[102] Ergo all agency interpretations should be reviewed under *Chevron*.[103]

In order to reach this result, Justice Scalia had to adopt a narrowing interpretation of *Mead* and the proposition that only agency actions having force of law are eligible for *Chevron* deference. In doing so, Justice Scalia held that it is not necessary to identify a delegation of power to act with the force of law with respect to the specific statutory provision in question; it is enough that Congress has in general terms authorized the agency to act with the force of law.[104] Thus, as long as Congress has generally authorized an agency to engage in legislative rulemaking or to render binding adjudications, a court should apply *Chevron* to any and all agency decisions the agency adopts, whether or not Congress has specifically authorized the agency to act with the force of law with respect to the issue in question.

Chief Justice Roberts filed a vigorous dissent, joined by Justices Kennedy and Alito. He wrote in part:

> Courts defer to an agency's interpretation of law when and because Congress has conferred on the agency interpretive authority over the question at issue. An agency cannot exercise interpretive authority until it has it; the question whether an agency enjoys that authority must be decided by a court, without deference to the agency.[105]

Specifically, Chief Justice Roberts objected to the interpretation of *Mead* as making an agency eligible for *Chevron* deference based on one generic authority to act with the force of law.[106] Instead, courts must undertake to determine whether the agency has been given authority to act with the force of law with respect to the specific issue in contention.[107]

The question whether the FTC has authority to issue legislative rules on competition matters would seem to implicate the scope of the agency's regulatory authority or jurisdiction. Under *Arlington*, this does not matter. The critical question is whether the agency has been given general authority to act with the force of law. With respect to the agency at issue in *Arlington*—the FCC—Justice Scalia was able to rely on precedent holding that it has general authority

102. *Id.* at 297–98.

103. *See id.* at 306–07. The "ergo," of course, does not follow. One could equally argue that if the transgression of any limit on agency authority renders its action ultra vires, all limits should be interpreted as a matter of independent judgment, which is effectively what the APA requires. *See* 5 U.S.C. § 706(2)(C).

104. *City of Arlington*, 569 U.S. at 306.

105. *Id.* at 312 (Roberts, C.J., dissenting).

106. *Id.* at 317.

107. *Id.* at 318.

to issue legislative rules as to all titles that it administers.[108] With respect to the FTC, the answer to this question is by no means simple or straightforward.

One possible source of authority for the FTC to act with the force of law is § 5 of the FTC Act, which authorizes the agency to file complaints and determine whether particular firms are engaging in unfair methods of competition.[109] If the FTC finds a violation, it can issue a cease and desist order.[110] However, under the original FTC Act, and still today, the agency has no authority to enforce such orders if they are challenged in court.[111] Rather, the order must be reviewed by a federal court of appeals, and if the court determines that it is valid, it will be *enforced by the court*.[112] Whether this constitutes agency authority to act with the force of law, or is more accurately characterized, as the Court did in a landmark decision in 1935, *Humphrey's Executor v. United States*,[113] as the agency acting as a "judicial aid" to the court, is debatable.[114]

Another possible source of authority for the FTC to act with the force of law is § 6(g), which authorizes the agency to "make rules and regulations for the purpose of carrying out the provisions of this subchapter."[115] As discussed in Part III, this was long understood to refer to procedural rules and other housekeeping matters. It is true that in recent cases the Court has often construed such generic rulemaking grants to include the authority to issue legislative rules.[116] But the historical understanding of the FTC rulemaking grant, and the fact that Congress saw fit in 1975 to adopt an explicit grant of legislative rulemaking authority for the FTC with respect to deceptive practices, would seem to counsel against this interpretation.[117]

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108. *See id.* at 296 ("Chevron thus provides a stable background rule against which Congress can legislate: Statutory ambiguities will be resolved, within the bounds of reasonable interpretation, not by the courts but by the administering agency.") (citing AT&T Corp. v. Iowa Utils. Bd., 525 U.S. 366, 397 (1999) (Souter, J., concurring in part and dissenting in part)).

109. 15 U.S.C. § 45(b).

110. *Id.*

111. *See infra* Part III.A, Part III.E.

112. 15 U.S.C. § 45(c) ("To the extent that the order of the Commission is affirmed, the court shall thereupon issue its own order commanding obedience to the terms of such order of the Commission.").

113. 295 U.S. 602 (1935).

114. *Id.* at 628; *see* Thomas W. Merrill & Kristin E. Hickman, Chevron*'s Domain*, 89 GEO. L.J. 833, 890–92 (2001) (arguing that agency orders that can only be enforced by an Article III court do not have the "force of law").

115. FTC Act, Pub. L. No. 63-203, § 6(g), 38 Stat. 717, 722 (1914) (codified at 15 U.S.C. § 46(g)).

116. *See, e.g.*, sources cited *supra* note 5.

117. *See infra* Part III.

Even if a court were to conclude that the FTC has a generic source of authority to act with the force of law within the meaning of *Arlington*, there is still the question whether the FTC Act, as amended, is "unclear" or "ambiguous" as to whether this-force-of-law authority extends to issuing legislative rules about competition policy. *Chevron* deference applies only when a court concludes, at step one, that Congress has not clearly or unambiguously addressed the precise question at issue. *Arlington* reaffirms this understanding.[118] Courts should enforce the limits Congress has placed on agency authority, Justice Scalia wrote, "by taking seriously, and applying rigorously, in all cases, statutory limits on agencies' authority. Where Congress has established a clear line, the agency cannot go beyond it; and where Congress has established an ambiguous line, the agency can go no further than the ambiguity will fairly allow."[119]

So even if the *Chevron* doctrine applies, the decisive question is likely to boil down to one question of statutory interpretation: has Congress clearly or unambiguously foreclosed FTC authority to issue legislative rules on matters of competition policy? If the answer is yes, then the FTC's assertion of such authority must be rejected at *Chevron*'s step one. As the Court observed in *Chevron*, "If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously intent of Congress."[120] It is to that question of statutory interpretation that the Article now turns.

III. FTC RULEMAKING AUTHORITY AS A MATTER OF ORDINARY STATUTORY INTERPRETATION

A. *The Original Understanding*

Congress created the FTC in 1914.[121] And, as a creation of Congress, it has only the powers given to it by Congress.[122] In terms of regulatory

118. City of Arlington v. FCC, 569 U.S. 290, 307 (2013).

119. *Id.*

120. Chevron U.S.A., Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837, 842–43 (1984).

121. *See generally* FTC Act, ch. 311, §§ 1–10, 38 Stat. 717 (1914) (codified at 15 U.S.C. §§ 41–58).

122. *See, e.g.*, Bowen v. Georgetown Univ. Hosp., 488 U.S. 204, 208 (1988) ("It is axiomatic that an administrative agency's power to promulgate legislative regulations is limited to the authority delegated by Congress."); La. Pub. Serv. Comm'n v. FCC, 476 U.S. 355, 374 (1986) ("[A]n agency literally has no power to act . . . unless and until Congress confers power upon it."); Chrysler Corp. v. Brown, 441 U.S. 281, 302 (1979) ("The legislative power of the United States is vested in the Congress, and the exercise of quasi-legislative authority by governmental departments and agencies must be rooted in a grant of such power by the Congress and subject to limitations which that body imposes."). The Court reaffirmed this understanding in *West Virginia v. EPA*, 142

authority, the relevant provision was § 5, which declared that "unfair methods of competition in commerce are hereby declared unlawful."[123] Congress subsequently amended this provision in two respects. The current Act declares that unfair methods are also prohibited when they only "affect[] commerce."[124] And it now also prohibits "unfair or deceptive acts or practices in or affecting commerce."[125] Thus, while the Act originally prevented only "unfair methods of competition," i.e., antitrust violations, it now prohibits not only antitrust violations but also "unfair or deceptive acts or practices," i.e., false advertising and the like.

The enforcement powers given to the Commission under § 5 remain largely as they were established in 1914. The Act empowers the Commission to file complaints, hold hearings, and issue cease and desist orders when it finds that some person or entity has engaged in unfair methods of competition or unfair and deceptive acts or practices.[126] In order to enforce a cease and desist order, the original Act required the FTC to bring an enforcement action in the court of appeals.[127] Thus, Commission orders were not self-executing but could only be enforced by an Article III court. Congress has since modified the Act to provide that the Commission's orders are "final" if the person or entity directed to cease and desist does not appeal the order or, if it has been appealed, after a final judgment upholding it on appeal.[128] With respect to "final orders" regarding "unfair or deceptive" acts, the Commission itself may file a civil action seeking penalties for violation of a final order in federal district court.[129] Otherwise, however, the DOJ must bring civil penalty actions in federal district court.[130] By negative implication, therefore, cease and desist

S. Ct. 2587, 2609 (2022) (agencies "have only those powers given to them by Congress").

123. FTC Act, Pub. L. No. 63-203, § 5, 38 Stat. 717, 719 (1914) (codified at 15 U.S.C. § 45(a)(1)).

124. *Id.*

125. The current Act reads: "Unfair methods of competition in or affecting commerce, and unfair or deceptive acts or practices in or affecting commerce, are hereby declared unlawful." *Id.* Congress added the explicit extension to unfair and deceptive acts and practices in the Wheeler-Lea Act of 1938, Pub. L. No. 75-447, 52 Stat. 111. Congress added the change from acts and practices "in commerce" to those "affecting commerce" in the Magnuson-Moss Warranty—Federal Trade Commission Improvements Act of 1975. *See* Pub. L. No. 93-637, sec. 201(a), § 5, 88 Stat. 2183, 2193 (1975).

126. FTC Act, Pub. L. No. 63-203, § 5, 38 Stat. 717, 719 (1914) (codified at 15 U.S.C. § 45(b)).

127. § 5, 38 Stat. at 720 (codified at 15 U.S.C. § 45(l)).

128. § 5, 38 Stat. at 721 (codified at 15 U.S.C. § 45(g)(1)–(2).

129. 15 U.S.C. § 45(m)(1)(A).

130. *Id.* § 45(l).

orders regarding antitrust matters (that is, "unfair methods of competition" as opposed to "unfair or deceptive" acts or practices), when they become final, may only be enforced by a court pursuant to an action brought by the DOJ. Which makes sense, given that DOJ has concurrent authority to ask courts to adjudicate violations of the antitrust laws.[131]

The original Act also authorized the Commission, under § 6, to investigate corporations and issue reports for the use of the public and Congress about the "organization, business, conduct, practices, and management of any corporation."[132] Section 6(g) of the Act authorized the Commission "[f]rom time to time to classify corporations and to make rules and regulations for the purpose of carrying out the provisions of this Act."[133]

What was the original meaning of the rulemaking grant found in § 6(g)? The best answer would seem to be that it was understood to empower the FTC to adopt "procedural" or internal housekeeping rules.[134] The relevant substantive authority over unfair competition was conferred by § 5.[135] This clearly contemplated adjudication, not rulemaking. Indeed, § 5 did not even contemplate an adjudication having the force of law, something that was regarded as problematic for an administrative body in 1914.[136] Any order issued under § 5 could only be enforced by an Article III court. Section 6 included a grant of authority to "make rules and regulations for the purpose[s] of carrying out the provisions of this Act."[137] The referenced "rules and regulations" almost certainly meant procedural rules and regulations, since there was no provision in § 6 (or elsewhere) for the Commission to bring an enforcement action based on such rules.[138] This inference is reinforced by the placement of the rulemaking grant in § 6, which authorized investigations and reports but not any form of substantive regulation.[139]

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131. *See, e.g.*, FTC v. Cement Inst., 333 U.S. 683, 694–95 (1948) (holding that the FTC and DOJ can exercise concurrent jurisdiction over the same conduct by the same parties).

132. § 6, 38 Stat. at 722 (codified at 15 U.S.C. § 46).

133. § 6(g) 38 Stat. at 722 (codified at 15 U.S.C. § 46(g)).

134. Thomas W. Merrill & Kathryn Tongue Watts, *Agency Rules with the Force of Law: The Original Convention*, 116 HARV. L. REV. 467, 505 (2002).

135. § 5, 38 Stat. at 719 (codified at 15 U.S.C. § 45).

136. Thomas W. Merrill, *Article III, Agency Adjudication, and the Origins of the Appellate Review Model of Administrative Law*, 111 COLUM. L. REV. 939, 969–70 (2011).

137. § 6(g), 38 Stat. at 722 (codified at 15 U.S.C. § 46(g)).

138. *See* Am. Mining Cong. v. Mine Safety & Health Admin., 995 F.2d 1106, 1109 (D.C. Cir. 1993) (explaining that rules are legislative rather than interpretive when they are the predicate for an enforcement action).

139. In *Humphrey's Executor v. United States*, 295 U.S. 602 (1935), the Supreme Court

The fact that the rulemaking provision appears in a sentence authorizing the Commission to "classify corporations" further supports this inference.

Admittedly, it is logically possible to interpret § 6(g) as a grant of legislative rulemaking authority, and as interpreted, to assert that such rules could then be enforced through adjudications conducted under § 5, which is another "provision[] of [the] Act."[140] But the structure of the Act makes it highly unlikely that this was the original meaning of the Act. There is no language in the 1914 Act conferring authority on the Commission to bring enforcement actions against firms for violating the "rules" adopted under § 6. If § 6 contemplated legislative rules defining unfair competition, the only possible way to enforce such rules would be under § 5. But recall that orders issued under § 5 had to be developed through adjudication, and the description of the adjudication process clearly indicates that it is de novo. There is no hint of structuring the adjudication by promulgating pre-existing substantive rules. Recall too that FTC adjudication orders, once entered, could only be enforced by a court. It would be odd, to say the least, for a statute to confer legislative rulemaking authority on an agency, which rules would then be applied in orders that can only be enforced by courts. We usually think of legislative rulemaking authority as carrying with it various forms of ancillary authority, such as the power to enforce and interpret the rules so adopted.[141] But under the structure of the FTC Act, as originally enacted, the power to enforce—and presumably to interpret—the supposed rules would be lodged, via § 5, not in the agency, but in the enforcement court.

Any uncertainty about the original meaning of the rulemaking grant in § 6 is resolved by considering the jurisprudence of rulemaking as it existed in 1914. In 1914, both Congress and the courts followed a conv[ention for differentiating between grants of legislative and procedural rulemaking authority.[142] Grants of rulemaking were regarded as legislative only if the organic statute provided some sanction or penalty for violation of the rules in question.[143] If the grant did not include such a provision, it was understood to confer only procedural or internal housekeeping authority.[144] The rulemaking grant in § 6 of the FTC Act contains

interpreted § 6 as conferring "quasi-legislative" powers on the FTC, by which it meant power to aid Congress in its legislative functions. *Id.* at 624. The Court made no mention of the § 6(g) rulemaking grant.

140. § 6(g), 38 Stat. at 722 (codified at 15 U.S.C. § 46(g)).

141. *See* Kisor v. Wilkie, 139 S. Ct. 2400, 2412 (2019) ("[W]hen granting rulemaking power to agencies, Congress usually intends to give them, too, considerable latitude to interpret the ambiguous rules they issue.").

142. Merrill & Watts, *supra* note 134, at 495.

143. *Id.* at 472, 549–50.

144. *Id.* at 472.

no mention of any sanction for violation of the rules issued under its authority. Thus, it was clearly understood at the time of enactment to be a grant of procedural rulemaking authority.[145] As previously noted, this shared understanding is reinforced by the placement of the rulemaking grant in § 6, which deals with information gathering and issuing reports.

For those who would consult legislative history—a shrinking tribe largely on the defensive these days—the available evidence fully confirms the inference of original meaning drawn from the text, the structure of the Act, and conventions about rulemaking in effect at the time of enactment. As Victoria Nourse has emphasized, the most powerful form of legislative history is the conference report, since this is where divergent versions of legislative bills are reconciled, and both Houses vote to approve the report.[146] Section 6(g) originated in the House bill, which conferred only investigative powers on the FTC, not adjudicative power.[147] The Senate bill granted the FTC adjudicative power but contained no reference to rulemaking.[148] The Conference Committee adopted the House measures on investigation, including § 6(g), and the Senate provisions regarding adjudication.[149] Under established practices for reconciling bills in conference, the Committee could not have granted the FTC legislative rulemaking authority over unfair competition matters, since neither bill granted the agency such authority.[150] In explaining the conference report to the House, Representative Covington, a member of the Conference Committee, stated that the "[FTC]will have no power to prescribe the methods of competition to be used in the future."[151] If one believes that we should consult legislative history to help determine meaning, this evidence is as close to conclusive as one can get.

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145. The so-called "[H]ousekeeping [S]tatute," 5 U.S.C. § 301, which predates the FTC Act, generally authorizes executive branch agencies to promulgate procedural rules and internal operating procedures. *See* Chrysler Corp. v. Brown, 441 U.S. 281, 308–10 (1979). But the Act confers this authority only on "the head[s] of . . . [e]xecutive department[s] or military department[s]," and the FTC was envisioned as an "independent agency," not an executive department. *Id.* at 309; Merrill & Watts, *supra* note 134, at 486. So, Congress may have felt it was necessary to include a specific grant of authority for the FTC to adopt procedural rules.

146. VICTORIA NOURSE, MISREADING LAW, MISREADING DEMOCRACY 79–88 (2016).

147. *See* S. Doc. No. 63-573, at 15 (2d Sess. 1914).

148. *Id.* at 7–10.

149. Merrill & Watts, *supra* note 134, at 505.

150. *Id.*

151. 51 CONG. REC. 14,932 (1914).

B. Contemporary and Longstanding Agency Interpretation

Even if one thinks that § 6(g) is ambiguous, relevant canons of statutory interpretation powerfully reinforce the conclusion that Congress did not contemplate legislative rulemaking. A prominent canon of statutory interpretation, well established in 1914 and frequently referenced afterwards, is that the interpretation of a statute by an agency closely contemporaneous with its enactment is entitled to significant weight.[152] A related canon is that longstanding and consistent agency interpretations by an agency are entitled to significant weight.[153]

Soon after the enactment of the FTC Act in 1914, and consistently for nearly fifty years thereafter, the FTC interpreted the statute as conferring only the power to conduct adjudications and investigations and not as conferring any power to issue legislative rules. During the latter part of this period, the FTC experimented with various "Guides" and "Trade Practice Conferences."[154] But these were understood to be voluntary, not legally binding.[155]

C. Congressional Ratification

Another relevant canon of interpretation is that the interpretation of a statute by the relevant administrative agency will be given significant weight if Congress has ratified that interpretation. Congress ratified the FTC's original understanding of § 6(g) on multiple occasions. Over the years, it enacted several discrete statutes conferring legislative rulemaking power on the FTC—in each case with respect to a specific industry. These enactments included the Wool Products Labeling Act of 1940,[156] the Fur Products Labeling Act of 1951,[157] and the Flammable Fabrics Act of 1953.[158] These discrete enactments of legislative rulemaking authority clearly presuppose that the FTC did not have any general authority to make legislative rules under the original FTC Act, otherwise, these laws would have been unnecessary.

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152. *See generally* Merrill & Watts, *supra* note 134, at 487.

153. *See* MERRILL, *CHEVRON* DOCTRINE, *supra* note 15, at 33–54, 146–65 (reviewing both canons). *See generally* Aditya Bamzai, *The Origins of Judicial Deference to Executive Interpretation*, 126 YALE L.J. 908 (2017).

154. Merrill & Watts, *supra* note 134, at 551–52.

155. *Id.* at 471–72, 551–52.

156. Wool Products Labeling Act of 1940, ch. 871, § 1, 54 Stat. 1128 (codified at 15 U.S.C. § 68d(a)); *see* Merrill & Watts, *supra* note 134, at 549.

157. Fur Products Labeling Act, ch. 298, § 1, 65 Stat. 175 (1951) (codified at 15 U.S.C. § 69f(a)); *see* Merrill & Watts, *supra* note 134, at 549.

158. Flammable Fabrics Act, Pub. L. No. 83-88, 67 Stat. 111, 112 (1953); *see* Merrill & Watts, *supra* note 134, at 550.

Any doubt on this score is eliminated by an episode that occurred in the early 1960s. Prodded by advocates who, like Chairman Kahn and her supporters, earnestly believed the agency should have legislative rulemaking authority, the FTC adopted a legislative rule prescribing the types of product labeling appropriate for the sale and promotion of cigarettes.[159] Congress promptly overturned the rule with the enactment of the Federal Cigarette Labeling and Advertising Act in 1965.[160]

Indeed, the history of the FTC with respect to legislative rulemaking authority is strikingly similar to the history of the FDA with respect to the latter agency's authority to regulate tobacco products. When the FDA disclaimed any authority over tobacco,[161] Congress enacted a series of statutes prescribing restrictions on marketing tobacco products and assigned authority to enforce those statutes to agencies other than the FDA.[162] When the FDA, at the urging of the Clinton Administration, changed its mind and asserted that it did have regulatory authority over tobacco, the Supreme Court struck down its rule.[163] The Court concluded that the history of interaction between Congress and the agency made it clear that Congress gave the FDA no regulatory authority over tobacco.[164] Similarly, the history between the FTC and Congress indicates that it was well understood that the agency had no authority to make legislative rules.

D. *National Petroleum Refiners*

Frustrated by Congress's piecemeal approach to conferring rulemaking authority on the FTC, proponents of more aggressive FTC action pushed the agency to adopt legislative rules and dare the courts to stop them.[165] The oil industry, as always, was a convenient target. The FTC was convinced to issue a legislative rule, grounded in both its competition rule and deceptive practices authority, requiring all gasoline stations to post octane ratings at every gas

159. 16 C.F.R. pt. 408 (1966).

160. Federal Cigarette Labeling and Advertising Act, Pub. L. No. 89-92, 79 Stat. 282 (1965); *see* Merrill & Watts, *supra* note 134, at 553–54.

161. Brown & Williamson Tobacco Corp. v. FDA, 153 F.3d 155, 168–69 (4th Cir. 1998), *aff'd*, 529 U.S. 120 (2000).

162. *Brown & Williamson Tobacco Corp.*, 529 U.S. at 143–44.

163. *Id.* at 126.

164. *Id.* at 159–60.

165. For a history of fluctuating attitudes toward FTC rulemaking, see Kurt Walters, *Reassessing the Mythology of Magnuson-Moss: A Call to Revive Section 18 Rulemaking at the FTC*, 16 HARV. L. & POL'Y REV. 519 (2022).

pump.[166] The FTC explained that the rule would be applied in § 5 enforcement actions, with the only issue being whether the company had complied with the rule.[167] When the industry challenged the rule in court, the district court examined the historical evolution of the FTC's regulatory authority and concluded that Congress had delegated no authority to the agency to issue such a rule.[168]

The D.C. Circuit, acting through an arch-liberal panel consisting of judges Wright, Bazelon, and Robinson, reversed.[169] The appeals court framed the question as whether the text of § 6(g), in particular the reference to "rules and regulations," could be interpreted to authorize legislative rulemaking.[170] The court characterized the "plain meaning" of this phrase to be broad enough to including binding regulations, i.e., legislative rules.[171] But of course, there are other types of rules—interpretive rules, statements of policy, and procedural rules. So, the unadorned reference to "rules and regulations" was in fact ambiguous as to whether legislative rules were included. The court's basic strategy was to interpret the ambiguous language of § 6(g) using the broadest possible form of purposive interpretation:

> In determining the legislative intent, our duty is to favor an interpretation which would render the statutory design effective in terms of the policies behind its enactment and to avoid an interpretation which would make such policies more difficult of fulfillment, particularly where, as here, that interpretation is consistent with the plain language of the statute.[172]

The fact that § 5—the only provision that gave the FTC regulatory authority—made no mention of rulemaking was not dispositive, because no language in § 5 made the power to adjudicate unfair acts and practices the exclusive method of regulation.[173] This effectively reversed the standard presumption about the scope of delegated powers. Rather than seeking affirmative evidence of a delegation of power to make legislative rules, the court framed the question as whether there was affirmative evidence *not* to confer power to make legislative rules.[174] When the court turned to

166. Posting of Minimum Octane Ratings on Gasoline Pumps, 36 Fed. Reg. 23,871, 23,871 (1971). The current octane rating rules are stated to be based on the Commission's authority over deceptive practices. *See* 16 C.F.R. § 306.1 (2022).

167. Nat'l Petroleum Refiners Ass'n v. FTC, 340 F. Supp. 1343, 1344–45 (D.D.C. 1972), *rev'd*, 482 F.2d 672 (D.C. Cir. 1973).

168. *Nat'l Petroleum Refiners Ass'n*, 340 F. Supp. at 1345–46.

169. *Nat'l Petroleum Refiners Ass'n*, 482 F.2d. at 672.

170. *Id.* at 677.

171. *Id.* at 685–86.

172. *Id.* at 689.

173. *Id.* at 675–76.

174. *Id.* at 673, 691. Many years ago, in the *Queen and Crescent Case*, the Supreme Court

legislative history, which was still very much in vogue at the time, it pronounced the legislative history of the 1914 Act on the point "ambiguous."[175] The details were largely relegated to an appendix, so as to disguise the dissembling about this.[176]

With the presumption about the scope of delegated powers flipped on its head, the court had little trouble determining that the § 6(g) gave the FTC the power to issue legislative rules, which would then be enforced through § 5 adjudications. Citing "similar provisions" in other statutes, the court determined that "contemporary considerations of practicality and fairness" supported the FTC's position that it had the power to engage in legislative rulemaking.[177] In point of fact, the majority of these "similar provisions" were actually quite different, as they concerned the proper interpretation of *existing* grants of legislative rulemaking authority, not the question of whether there was a grant of such authority in the first place.[178]

To its credit, the D.C. Circuit addressed the interpretive arguments relied upon by the district court in concluding that legislative rulemaking power had not been given to the FTC.[179] These included the structural argument that the rulemaking grant appeared in § 6 rather than § 5, the weight ordinarily given the FTC's contemporaneous and longstanding understanding that it had no legislative authority, and Congress's apparent ratification of this understanding through the enactment of multiple rulemaking grants.[180] But the panel concluded that these interpretive guideposts were outweighed by what it characterized as the "felt and openly articulated concerns motivating

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held that the power of an agency to make legislative rules was "never to be implied" but had to be conferred expressly. *See* ICC v. Cincinnati, New Orleans, & Tex. Pac. Ry., 167 U.S. 479, 494–95 (1897). Justice Gorsuch, in his concurring opinion in *West Virginia v. EPA*, cited the case as demonstrating the venerable provenance of the major questions doctrine. 142 S. Ct. 2587, 2619 (2022) (Gorsuch, J., concurring).

175. *Nat'l Petroleum Refiners Ass'n*, 482 F.2d. at 686.

176. *Id.* at 698–709.

177. *Id.* at 678–83.

178. *Id.* at 678. For example, the issue in *National Broadcasting Co. v. United States*, 319 U.S. 190 (1943), was whether a grant of authority to the FCC to make "special regulations applicable to radio stations engaged in chain broadcasting" was limited to regulations governing matters of signal interference, or also extended to regulations restricting the number of stations owned by networks. *Id.* at 215. Other decisions cited by the court held that an agency given legislative rulemaking authority could cut off further consideration of issues governed by a rule in individual adjudications. *See* United States v. Storer Broad. Co., 351 U.S. 192, 202 (1956); Fed. Power Comm'n v. Texaco, Inc., 377 U.S. 33, 39–41 (1964).

179. *Nat'l Petroleum Refiners Ass'n*, 482 F.2d. at 693–97.

180. *Id.*

the law's framers": protecting the public from unfair competition and deceptive marketing practices.[181] Congress took the first step in 1914 when it eliminated the judicial monopoly on trials and gave the Commission authority to conduct adjudications.[182] Now, the Commission required authority to adopt legislative rules "to carry out what the Congress agreed was among its central purposes: expedited administrative enforcement of the national policy against monopolies and unfair business practices."[183] The rationale for the decision boiled down to the proposition that an ambiguous rulemaking grant should be construed to include the power to make binding legislative rules, because Congress could not foresee in 1914 how important rulemaking would become as a supplement to adjudication.

With the panel adopting the broadest conceivable purposive argument, and bending every possible precedent to favor the FTC, it came as no surprise that it overturned the district court and held the FTC had the power to issue the octane rule. The real surprise was that only Justice Stewart publicly noted that he would have granted certiorari, presumably to correct the D.C. Circuit's result-oriented decision.[184]

E. The 1975 Federal Trade Improvements Act

At the same time the D.C. Circuit was revising the FTC Act through aggressive interpretation, Congress was also considering whether to confer legislative rulemaking authority on the agency, which likely explains why the Supreme Court was reluctant to grant certiorari. The result was something called the Magnuson-Moss Warranty—Federal Trade Commission Improvements Act of 1975.[185] That Act gave the FTC authority to issue legislative rules with respect to unfair or deceptive acts or practices in or affecting commerce, i.e., deceptive advertising.[186] However, in keeping with the then-fashionable enthusiasm for "hybrid rulemaking," this new authority was hedged in with certain procedural requirements not found in the APA's

181. *Id.* at 690.

182. *Id.* at 693.

183. *Id.*

184. Nat'l Petroleum Refiners Ass'n v. FTC, 415 U.S. 951 (1974).

185. Magnuson-Moss Warranty—Federal Trade Commission Improvements Act, Pub. L. No. 93-637, 88 Stat. 2183 (1975). This Act was two statutes in one. The largest part dealt with warranty claims and conferred additional authority on the FTC to regulate warranties to make them more useful for consumers. A second part gave the FTC new powers to enforce its orders, seek relief for consumers when harmed by violations of FTC orders, and engage in legislative rulemaking on matters of deceptive practices.

186. 15 U.S.C. § 57a.

general provisions that govern legislative rulemaking.[187] For example, the FTC was directed to allow oral presentations and cross examination if necessary to resolve disputed issues of fact, and all rules were subject to judicial review under the substantial evidence standard of review.[188]

Significantly, Congress also expressly provided that the new rulemaking authority with respect to unfair or deceptive acts and practices would be the *exclusive source* of authority to make such rules.[189] The Act provided: "The Commission shall have no authority under this subchapter, other than its authority under this section, to prescribe any rule with respect to unfair or deceptive acts or practices in or affecting commerce (within the meaning of [§ 5] of this title)."[190] This was an express affirmation of the *expressio unis* canon—the expression of one thing precludes the inclusion of another. Standing alone, this sentence would preclude any exercise of rulemaking by the FTC under the general notice-and-comment procedures of the APA.

Then came the following sentence: "The preceding sentence shall not affect any authority of the Commission to prescribe rules (including interpretive rules), and general statements of policy, with respect to unfair methods of competition in or affecting commerce."[191] Thus, the addition of express rulemaking authority with respect to unfair or deceptive practices did not extend to "any authority" the Commission might have to issue rules with respect to unfair methods of competition, i.e., antitrust matters. Congress underscored the

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187. 5 U.S.C. § 553. On the movement for hybrid rulemaking, see Stephen F. Williams, *"Hybrid Rulemaking" under the Administrative Procedure Act: A Legal and Empirical Analysis*, 42 U. CHI. L. REV. 401 (1974). At least as a matter of judicially-imposed procedures, the trend came to an abrupt end with *Vt. Yankee Nuclear Power Corp. v. Nat. Res. Def. Council, Inc.*, 435 U.S. 519 (1978) (holding that courts generally have no authority to impose procedures on agencies beyond those required by the APA).

188. *See* Magnuson-Moss Warranty—Federal Trade Commission Improvements Act, Pub. L. No. 93-637, § 202(c)(1), (e)(3), 88 Stat. 2183, 2194–95 (1975). The original hybrid provisions are codified at 15 U.S.C. § 57a(c)(2) and § 57a(e)(3)(B). Without expanding the FTC's authority beyond deceptive practices rulemaking, Congress added additional hybrid procedures in 1980, including a requirement that rulemaking be conducted before an independent hearing officer, a prohibition on ex parte contacts, a requirement that the Commission provide a regulatory analysis of the need for the rule, a requirement that rules be submitted to the appropriate congressional committees before they become final, and a provision for a two-House veto of rules. *See* Federal Trade Commission Improvements Act of 1980, Pub. L. No. 96-252, 94 Stat. 374 (codified in part at § 57a(b)(2)(A), (c)(1)(B), (d)(1)).

189. § 57a(a).

190. § 57a(a)(2). The Act clarified that the Commission would also have authority to issue interpretative rules and statements of policy (which do not have the force of law) with respect to unfair or deceptive acts or practices. § 57a(a)(1)(A).

191. § 57a(a)(2) (emphasis added).

significance of these qualifying sentences by amending the original § 6(g) to provide that the FTC had authority to make rules and regulations for the purposes of carrying out the provisions of this Act "except as provided in section 57a(a)(2) of this title"—the provision containing the two forgoing sentences.

Herein lies what may be the dispositive question about the scope of the FTC's authority to issue legislative rules dealing with unfair competition as opposed to deceptive practices. Clearly, the second sentence meant to preserve the status quo with respect to the FTC's rulemaking authority in antitrust matters. Chairman Kahn and her supporters will argue that the status quo was the meaning attributed to the Act by the D.C. Circuit's 1973 decision in *National Petroleum Refiners*.[192] After all, the D.C. Circuit had authoritatively construed the original § 6(g) to confer legislative rulemaking authority on the FTC in both competition and deceptive practices matters, the Supreme Court had denied certiorari, and this had occurred before the enactment of the Magnuson-Moss Warranty—Federal Trade Commission Improvements Act in 1975.[193]

The first thing to do, as always, is to take a close look at the text of this savings clause. Note that the savings clause mentions only two types of "rules" affecting unfair competition which are to remain unaffected by the adoption of rulemaking authority over deceptive practices: interpretative rules and general statements of policy.[194] As previously discussed, the most important "rules" employed by the FTC and DOJ in competition matters are the Merger Guidelines, which are general statements of policy, not legislative rules. One or more members of Congress, or someone on the staff, was apparently aware of the importance of the Merger Guidelines and thought it was important to provide that they were not affected.[195] There is no mention of legislative rules about competition policy, although Congress

192. The only source cited by the FTC for its authority to promulgate a legislative rule in an unfair competition matter is National Petroleum Refiners Association v. FTC, 415 U.S. 951 (1974). Non-Compete Clause Rule, 88 Fed. Reg. 3,482, 3,499 n.226 (proposed Jan. 19, 2023) (to be codified at 16 C.F.R. pt. 910).

193. The Supreme Court denied certiorari on February 25, 1974. *See* Nat'l Petroleum Refiners Ass'n v. FTC, 415 U.S. 951 (1974). The House approved the conference report on the bill that became the FTC Improvements Act ten months later, on December 16, 1974. 120 CONG. REC. 40,238 (1974). The Senate followed suit two days after that. 120 CONG. REC. 40,711 (1974).

194. It says, "including interpretive rules" and "general statements of policy," however, there are other types of rules besides legislative rules, such as procedural rules and rules governing matters of internal organization. 15 U.S.C. § 57a(a)(2). So, one cannot infer from the use of the word "including" that legislative rules were saved.

195. The Merger Guidelines were first issued in 1968. *1968 Merger Guidelines*, U.S. DEPT. OF JUST., https://www.justice.gov/archives/atr/1968-merger-guidelines (Aug. 4, 2015).

added a provision preserving rules adopted under the authority of § 6(g) prior to the date of the amendment, thereby saving the octane rule.[196]

Consider, too, the oddity that Congress would see fit to adopt relatively more restrictive hybrid procedures for rulemaking about deceptive practices while supposedly allowing the FTC to engage in legislative rulemaking in competition matters using the more streamlined notice-and-comment procedures of § 553 of the APA. Antitrust cases are often fact-intensive, which is one reason why they have been resolved using trial-type procedures ever since the Sherman Act was passed in 1890. Given that Congress was enamored of hybrid rulemaking procedures in 1975, on the ground that they would allow more intensive probing of fact issues, one would expect it to require the use of such procedures in competition cases if Congress intended to ratify FTC rulemaking authority in competition cases. Instead, it focused its attention exclusively on deceptive practices, and mentioned the FTC's unfair competition authority only in a savings clause.

Recall as well that the FTC's authority to enforce the antitrust laws is exercised concurrently with DOJ. DOJ has always enforced those laws using case-by-case adjudication in court. There has always been some tension between the FTC and DOJ over their respective spheres of authority in enforcing the antitrust laws.[197] If DOJ thought that Congress was ratifying FTC authority to adopt legislative rules dealing with competition policy, while the Antitrust Division had to remain content to engage in case-by-case adjudication, the protests would have penetrated even the thickest walls of the legislative office buildings on the Hill.

Finally, the entire focus of the Magnuson-Moss Warranty—Federal Trade Commission Improvements Act of 1975 was on protecting consumers from misleading warranty claims and other deceptive practices. Improvements in antitrust enforcement were not on the table. There is much to be said for assuming that long and well-established institutional practices have not been overturned by obscure and ambiguous clauses in legislation devoted to other

196. Section 202(c)(1) of the Magnuson-Moss Warranty—Federal Trade Commission Improvements Act provided that the new rulemaking grant and the provision making it exclusive "shall not affect the validity of any rule which was promulgated under § 6(g) of the FTC Act prior to the date of enactment of this section." 88 Stat. 2198 (not codified). Congress codified a version of the octane rule in 1978. Petroleum Marketing Practices Act, Pub. L. No. 95-297, tit. II, § 202, 92 Stat. 334 (1978) (codified at 15 U.S.C. § 2822). The implementing regulations currently state that a violation of the rule "is an unfair or deceptive act or practice" under § 5 of the FTC Act, 16 CFR § 306.1 (2022), indicating that the rule is now understood to be grounded in deceptive practices concerns, rather than unfair competition.

197. HOVENKAMP, *supra* note 75, at 521 (focusing on § 13.1).

matters. (No "elephants in mouseholes" again).[198] By 1975, the FTC had enforced antitrust claims through case-by-case adjudication for fifty years; DOJ had been doing so even longer. Congress undoubtedly assumed that competition claims would continue to be addressed through case-by-case adjudication, informed by interpretive rules and general statements of policy like the Merger Guidelines. The agency's institutional practice in this regard was thoroughly entrenched and it is highly unlikely that Congress would act to upset this settled convention through ratification of a recent D.C. Circuit decision.

It is fair to ask whether the legislative history sheds any light on the two sentences of the 1975 Act making the new legislative rulemaking authority for deceptive practices "exclusive" and stating that the new authority "shall not affect any authority" of the Commission to prescribe rules in competition matters.[199] One thing we learn from that history is that the two sentences in question were added by the Conference Committee at the last moment. The Senate bill that served as the primary vehicle for the 1975 Act (S.B. 356) contained no grant of legislative rulemaking authority for the Commission.[200] The House amended the Senate bill in various ways, including by adding the grant of rulemaking for deceptive practices.[201] The House amendment stated flatly that "[t]he Commission shall have no authority under this Act, other than its authority under this section, to prescribe rules."[202] The matter was referred to a Conference Committee to iron out the differences, which returned a conference substitute that included, for the first time, the two sentences in question.[203] The Joint Explanatory Statement of the Committee of Conference observed that the new rulemaking grant "would be the exclusive authority for such rules" and that "[t]he conference substitute does not affect any authority of the FTC under existing law to prescribe rules with respect to unfair methods of competition in or affecting commerce."[204] In effect, the Joint Explanatory Statement simply paraphrased the two sentences in the text.

Some additional context is provided by the House Report issued in connection with the House bill that added the rulemaking grant.[205] The Report observed that hearings were held and the markup of the bill began after the District Court held that the FTC has no legislative rulemaking

198. *See* Whitman v. Am. Trucking Ass'ns, 531 U.S. 457, 468 (2001).

199. 15 U.S.C. § 57a(a)(2).

200. *See* S. REP. NO. 93-151 (1973); S. REP. NO. 93-280 (1973).

201. 120 CONG. REC. 33,979 (1974).

202. *Id.* (reproducing House amendments to Senate Bill 356 as reported to the Senate).

203. 120 CONG. REC. 40,247 (1974).

204. *Id.* (reproducing conference substitute and the Joint Explanatory Statement).

205. H. Rep. No. 93-1107, 93d Cong., 2d Sess., 29–34 (June 13, 1974).

authority.[206] In contrast, the final version of the bill, and the accompanying Report, were prepared after the D.C. Circuit had reversed that decision.[207] The Report described the effect of the D.C. Circuit's decision as being "to recognize the FTC's authority to prescribe rules having substantive effect which would constrain the conduct of legitimate businesses based on the very broad standards of unfair methods of competition and unfair or deceptive acts or practices."[208] It went on to observe that such rules would be adopted using the notice-and-comment procedures of § 553 of the APA, and would be reviewed under the arbitrary and capricious standard of review. It then stated: "Your committee believes that these rulemaking procedures and the scope of judicial review are inadequate for proceedings in which the integrity of the proposed rule may rest on the resolution of issues of material fact."[209] Hence, the hybrid procedures prescribed for the new rulemaking grant for deceptive practices were designed to "afford the safeguards which are needed."[210] Similar statements are found in the section-by-section analysis of the Report.[211]

In describing the new rulemaking authority in greater detail, the Report made clear that the House bill repealed the rulemaking grant in § 6(g), and hence precluded any authority for the FTC to engage in legislative rulemaking in antitrust matters:

> Section 202 replaces the existing rulemaking authority of the FTC under section 6(g) of the Act with a new section 18 which authorizes the FTC to issue rules defining with specificity the acts or practices which are unfair or deceptive and which are within the scope of section 5(a)(1) of the Federal Trade Commission Act . . . . This rulemaking authority would be the exclusive substantive rulemaking authority of the FTC under the Federal Trade Commission Act. Thus, the Commission would not have rulemaking authority with respect to unfair methods of competition to the extent they are not unfair for deceptive acts or practices.[212]

206. *Id.* at 33.

207. *Id.* (citing the Appeals Court decision and noting the Supreme Court's denial of certiorari).

208. *Id.*

209. *Id.*

210. *Id.*

211. *Id.* at 45–48; *see, e.g.*, *id.* at 45 ("Your committee believes these [notice-and-comment] rulemaking procedures and this scope of judicial review may be inadequate in some cases where fundamental factual premises of a rule are at issue.").

212. H.R. REP. NO. 93-1107, at 46 (1974) (emphasis added).

The FTC responded to the House bill with a critical letter.[213] The Commission stated that the D.C. Circuit's decision in *National Petroleum Refiners* had "laid to rest" any doubts about whether the agency had authority to promulgate legislative rules.[214] Therefore, the Commission saw "no need for legislative reaffirmation of its rulemaking authority."[215] The FTC was especially critical of the bill's adoption of hybrid procedures for deceptive practices rulemaking which, according to the Commission, would "prevent the Commission from expeditiously fulfilling its responsibilities."[216] Finally, the Commission objected to prohibition of rulemaking in competition matters. It wrote:

> The Commission perceives no reason for curtailing its powers in this area. Admittedly, the Commission's consumer protection responsibilities are far more conducive to the rulemaking process, and, for this reason, the Commission does not foresee a high level of rulemaking activity in the antitrust area. That is not to say, however, that rulemaking is not an appropriate or an effective regulatory device for antitrust enforcement. For instance, where the legality of identical, similar, or related practices of an anticompetitive nature may be addressed responsibly and more efficiently in a single proceeding than in case-by-case adjudication, law enforcement by rulemaking would be considered more favorably."[217]

Although it reproduced the Commission's letter in its Report, the House Committee was unmoved by these entreaties.

As previously noted, the Conference Committee softened the House's language that expressly precluded rulemaking in antitrust matters, substituting instead the savings clause that preserved "any authority" the FTC had to engage in rulemaking with respect to unfair competition.[218] The Joint Explanatory Statement of the Committee of Conference contains no explanation for the last-minute change,[219] although as previously speculated, it may have been motivated by a desire to avoid casting doubt on the Merger Guidelines. There is no suggestion in the Joint Explanatory Statement that the savings clause was added to preserve the D.C. Circuit's interpretation of the original § 6(g). There is one reference to the "octane rating" rule, but no mention of the D.C. Circuit's decision in *National Petroleum Refiners* upholding that rule based on its

213. *Id.* at 56–61 (reproducing the April 29, 1974 letter from the FTC to Congressman Harley Staggers, Chair of the House Committee on Interstate and Foreign Commerce).

214. *Id.* at 57.

215. *Id.*

216. *Id.* at 57–58.

217. *Id.* at 57.

218. 15 U.S.C. § 57a(a)(2).

219. *See generally* 120 CONG. REC. 40,244–50 (1974).

interpretation of the original § 6(g).[220] As previously noted, the Conference Bill amended § 6(g) by qualifying the authority of the FTC to make rules under § 6(g) by referencing the limitations added by new rulemaking grant and the savings clause.[221]

When we examine the statements made on the floor of the House and Senate as the members prepared to vote on the conference report, we find some references to the "octane ruling" and in one instance to *National Petroleum Refiners*.[222] Particularly in the Senate, which was taken by surprise by the House's addition of legislative rulemaking in deceptive practices cases, several speakers appeared to assume that the FTC had been "granted" rulemaking authority by a recent judicial decision. But with one exception,[223] the Senators had only a vague notion about which court had rendered the decision or whether it applied to competition matters as well as deceptive practices.[224]

The House provided a more extensive explanation of the reason for the rulemaking grant and its limits. Representative James Broyhill of North Carolina was closely involved in the drafting of the grant of rulemaking authority and was one of the House managers in the Conference Committee. In urging his fellow legislators to adopt the

220. *Id.* at 40,247.

221. *See infra* notes 222–223.

222. Senator Gary Hart of Colorado, who was not a member of the Conference Committee, quoted from the D.C. Circuit's opinion in *National Petroleum Refiners* and observed that the bill about to be passed would establish a kind of natural experiment between hybrid procedures, which would apply to deceptive practices rules, and informal rulemaking procedures, which would apply to rules respecting unfair competition. 120 CONG. REC. 40,713 (1974) (statement of Sen. Hart). So, he at least read the savings clause as preserving the *National Petroleum Refiners* interpretation as applied to competition matters.

223. *See supra* note 200 and accompanying text.

224. For example, Senator Warren Magnuson, a bill sponsor and a member of the Conference Committee, thought that the hybrid rulemaking procedures in the conference report struck the right balance between fairness and avoiding abuse, at least relative to "the completely informal rulemaking procedure under which the Commission is presently authorized to operate." 120 CONG. REC. 40,713 (1974) (statement of Sen. Magnuson). Senator Taft of Ohio, who was not a member of the Conference Committee, expressed concern that the hybrid procedures endorsed by the Conference Committee provided inadequate protection to firms in developing a record about contested questions of fact. This was especially true given that "the Supreme Court in a recent ruling has recently given to the Federal Trade Commission very broad rulemaking power, subject only, of course, to the due process requirement." *Id.* at 40,723 (statement of Sen. Taft) (Although one cannot be completely sure, he evidently thought that *National Petroleum Refiners* was a decision of the Supreme Court).

conference report, he began by explaining the rationale for the rulemaking provision:

> For a number of years, the FTC issued rules defining acts or practices deemed unfair or deceptive to consumers. During this period, there were continuing assertions that the FTC did not possess substantive rulemaking authority, and that any rules it issued had only the effect of being a guideline to industries.
>
> In the Octane Rating case, the court held that the Federal Trade Act did confer authority to the FTC to issue substantive rules defining both unfair methods of competition and unfair or deceptive acts or practices to consumers. Under this interpretation, the FTC has the authority to issue substantive rules which may affect an entire industry and, in some cases, a great number of industries. However, the Act is silent regarding the procedural requirements to be followed in issuing these rules; therefore, those persons immediately and seriously affected by such rules have no procedural rights before the agency except the informal rulemaking procedure set by the Administrative Procedures Act. Thus, the Interstate and Foreign Commerce Committee determined that the Federal Trade Commission Act should be amended to provide adequate procedural safeguards for those affected by the Commission's rules. In our judgment, more effective, workable, and meaningful rules will be promulgated if persons affected by such rules have an opportunity, by cross-examination and rebuttal evidence, to challenge the factual assumptions on which the agency is proceeding and to show in what respect such assumptions are erroneous.[225]

This summary of the background running up to the new legislation is entirely accurate, from the recognition of controversy over the authority of the FTC to make legislative rules (what Representative Broyhill calls "substantive rules"), to the recent interpretation of the FTC Act by the D.C. Circuit in *National Petroleum Refiners* (which he calls the "Octane Rating case"), to the recognition that such rules would be governed by the informal notice-and-comment procedures of the APA, to the rationale that the House committee had for adopting hybrid procedures in lieu of the APA procedures.[226]

Representative Broyhill then proceeded to describe the savings clause, i.e., what import the new rulemaking authority in deceptive practice matters would have for FTC authority in competition cases. His comments appear under the heading (which was likely added after he spoke): "Antitrust Rulemaking Authority Not Intended."[227] The transcript reads:

> The rulemaking provision, I might add, does not affect any authority the FTC might have to promulgate rules which respect to "unfair methods of competition" including, of course, antitrust prohibitions. I myself do not believe that the FTC has any such authority. I am advised that there is a passing reference in the appellate court decision in the Octane

225. 120 CONG. REC. 41,407 (1974) (statement of Rep. Broyhill).

226. *Id.*

227. *Id.*

> Posting case, to the effect that the FTC may have some kind of authority to issue some kind of antitrust rules. Antitrust rules would obviously have a far more pervasive effect than rules defining unfair or deceptive acts or practices, and I would feel very uncomfortable giving such antitrust rules the same effect as this bill gives consumer practices rules. Accordingly, we have made clear that the new bill does not deal with the antitrust laws.[228]

These statements are subject to the usual caveats about the probative value of interpretive statements of individual legislators. Representative Broyhill speaks primarily about his own views and caution is always in order before attributing the views of a single legislator to those of Congress as a whole.[229] But he spoke from a position of authority, as a member of the House committee that drafted the rulemaking grant and a member of the Conference Committee. No one in the House rose to challenge his views. Perhaps more importantly, his final sentence purports to speak for the Conference Committee: "[W]e have made clear that the new bill does not deal with the antitrust laws."[230]

Broyhill's understanding of the FTC Act as it existed in 1974 is consistent with the statements of Senators noted above.[231] They all assume that the D.C. Circuit's decision is the most recent and authoritative judicial interpretation of the scope of the FTC's rulemaking authority. The Senators, however, do not offer any independent view about the correct meaning of the FTC Act as of 1974. Representative Broyhill states that "I myself do not believe the FTC has any such authority."[232] So he, at least, disagreed with the D.C. Circuit interpretation of the Act. The bottom line of the Broyhill comments is that the Improvements Act "does not deal with the antitrust laws."[233] This is consistent with the best understanding of the 1975 legislation that can be gathered from the text.

In sum, the enactment of the FTC Improvements Act in 1975 cannot be construed as a ratification of the D.C. Circuit's interpretation of § 6(g) of the original FTC Act in *National Petroleum Refiners*. The text of the 1975 Act makes no reference to *National Petroleum Refiners*. The context of the 1975 enactment makes clear that Congress was focused entirely on the Commission's authority to regulate deceptive practices, especially misleading warranties. The sole reference to rulemaking in competition matters; the savings clause now codified as 15 U.S.C. § 57a(a)(2) makes clear that antitrust rulemaking

228. *Id.* (emphasis added).

229. *Id.*

230. *Id.*

231. *See supra* notes 222–223.

232. 120 CONG. REC. 41,407 (1974) (comments of Rep. Broyhill).

233. *Id.*

was left untouched.[234] The fact that some participants in the legislative process assumed the D.C. Circuit had correctly interpreted § 6(g) does not matter; others thought it had not. The fact that the FTC wanted the D.C. Circuit's decision to be regarded as correct does not matter. The House and the Conference Committee rejected the Commission's entreaty to preserve its rulemaking authority as construed in *National Petroleum Refiners*.[235]

When Congress wrote that the conferral of new rulemaking authority on the FTC with respect to deceptive practices "shall not affect any authority of the Commission to prescribe rules . . . with respect to unfair methods of competition" it undoubtedly meant the "authority" of the FTC *correctly determined*.[236] Conceivably, the D.C. Circuit might accept the claim that the decision in *National Petroleum Refiners* should be regarded as the correct interpretation of the FTC's authority in this respect, on grounds of stare decisis. But for all the reasons previously given, this is not a plausible interpretation of the original Act. *National Petroleum Refiners* does not bind the Court, and it would be short work for the Court to see through the activism of that decision. The FTC Act did not authorize legislative rulemaking on any issue in 1914, and it did not authorize it for deceptive practices until 1975.[237] It has not authorized it with respect to unfair competition as of today.

CONCLUSION

The FTC's chair has made clear that she wants the FTC to have authority to issue legislative rules in competition matters. In early 2023, the Commission threw down the gauntlet, issuing a notice in the Federal Register proposing to adopt a legislative rule that would ban all non-compete agreements in employment contracts, on a nationwide basis.[238] If upheld by the courts, this would constitute a precedent for other legislative rules, such as rules requiring that high tech firms be broken up if they obtain a specified level of market dominance or rules that effectively transform tech firms into

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234. 15 U.S.C. § 57a(a)(2).

235. Any attempt by the FTC to argue that the 1975 Act ratified the interpretation in *National Petroleum Refiners* is undermined by the fact nearly fifty years have elapsed since the decision and the enactment of the Reform Act, and the FTC has not asserted authority to engage in legislative rulemaking based on § 6(g) in the intervening years. *See* Nat'l Petroleum Refiners Ass'n v. FTC, 482 F.2d 672, 698 (D.C. Cir. 1973); 15 U.S.C. § 46(g). As always, novel interpretations of agency authority inconsistent with longstanding practice should be regarded with skepticism.

236. 15 U.S.C. § 57a(a)(2).

237. *Id.* § 57a(a)(1)(A).

238. *See* Non-Compete Clause Rule, 88 Fed. Reg. 3,482 (proposed Jan. 19, 2023) (to be codified at 16 C.F.R. pt. 910).

common carriers.[239] Whatever one thinks of such ideas, administrative agencies are powerless to act under our system of government unless Congress gives them such power. When considered against the drafting conventions followed when Congress passed the FTC Act in 1914, the original law was never intended to grant legislative rulemaking authority to the FTC. The Commission adhered to this understanding for the first fifty years of its existence. Congress repeatedly ratified this understanding by enacting limited grants of rulemaking power to the FTC. The evidence that the FTC has the power to promulgate legislative rules regulating anti-competitive behavior consists of a single D.C. Circuit opinion that boils down to the proposition that legislative rulemaking had come to be regarded in the 1970s to be a good thing. The Supreme Court should make quick work of such a claim if and when any forthcoming rules are challenged.

The stakes here go to the heart of our system of separation of powers. Under the Constitution, only Congress has the power to legislate. We have come to understand that this means only Congress can create administrative agencies and delineate their authority.[240] When Congress has delegated authority to an agency, we have also come to understand—most prominently in the *Chevron* decision—that courts should generally defer to the agency's interpretation of ambiguities that fall within the scope of its delegated authority.[241] But this structure of government can be sustained only if courts conclude that Congress has *actually*, even if only implicitly, made the required delegation of regulatory authority. Adopting a fiction that any ambiguity in an agency's organic act is an implicit delegation of the power to regulate, to be accepted by courts if reasonable, is a recipe for a runaway administrative state. *West Virginia v. EPA* indicates that the Court now believes some corrective to *Arlington* is required. But the corrective should not be limited to what a majority of the Justices regard as a major question. *Chevron* should be clarified by requiring courts to determine the delegated authority of an agency in every case in which the scope of its authority is contested.[242] A future case addressing the FTC's assertion of authority to make legislative rules governing antitrust law would be a fitting occasion to do so.

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239. Some journalistic accounts suggest the FTC would like to adopt rules that would require high tech companies "to offer open and fair access to their platforms, enable data sharing with new entrants and offer data portability to consumers." Steve Lohr, *Biden Administration and Antitrust Officials Take Aim at Big Tech Companies*, N.Y. TIMES, Dec. 12, 2022, at B4.

240. *See supra* note 122 and accompanying text.

241. Cuozzo Speed Techs., LLC v. Lee, 579 U.S. 261, 276–77 (2016).

242. *See* MERRILL, *CHEVRON* DOCTRINE, *supra* note 15.

THE FEDERALIST NO. 52, [8 FEBRUARY 1788]

The Federalist No. 52[1]

By JAMES MADISON *or* ALEXANDER HAMILTON

[New York, February 8, 1788]

To the People of the State of New-York.

FROM the more general enquiries pursued in the four last papers, I pass on to a more particular examination of the several parts of the government. I shall begin with the House of Representatives.

The first view to be taken of this part of the government, relates to the qualifications of the electors and the elected. Those of the former are to be the same with those of the electors of the most numerous branch of the State Legislatures. The definition of the right of suffrage is very justly regarded as a fundamental article of republican government. It was incumbent on the Convention therefore to define and establish this right, in the Constitution. To have left it open for the occasional regulation of the Congress, would have been improper for the reason just mentioned. To have submitted it to the legislative discretion of the States, would have been improper for the same reason; and for the additional reason, that it would have rendered too dependent on the State Governments, that branch of the Fœderal Government, which ought to be dependent on the people alone. To have reduced the different qualifications in the different States, to one uniform rule, would probably have been as dissatisfactory to some of the States, as it would have been difficult to the Convention. The provision made by the Convention appears therefore, to be the best that lay within their option. It must be satisfactory to every State; because it is conformable to the standard already established, or which may be established by the State itself. It will be safe to the United States; because, being fixed by the State Constitutions, it is not alterable by the State Government, and it cannot be feared that the people of the States will alter this part of their Constitutions, in such a manner as to abridge the rights secured to them by the Fœderal Constitution.

The qualifications of the elected being less carefully and properly defined by the State Constitutions, and being at the same time more susceptible of uniformity, have been very properly considered and regulated by the Convention. A representative of the United States must be of the age of twenty-five years; must have been seven years a citizen of the United States, must at the time of his election, be an inhabitant of the State he is to represent, and during the time of his service must be in no office under the United States. Under these reasonable limitations, the door of this part of the Fœderal Government, is open to merit of every description, whether native or adoptive, whether young or old, and without regard to poverty or wealth, or to any particular profession of religious faith.

The term for which the Representatives are to be elected, falls under a second view which may be taken of this branch. In order to decide on the propriety of this article, two questions must be considered; first, whether biennial elections will, in this case, be safe; secondly, whether they be necessary or useful.

First. As it is essential to liberty that the government in general, should have a common interest with the people; so it is particularly essential that the branch of it under consideration, should have an immediate dependence on, & an intimate sympathy with the people. Frequent elections are unquestionably the only policy by which this dependence and sympathy can be effectually secured. But what particular degree of frequency may be absolutely necessary for the purpose, does not appear to be susceptible of any precise calculation; and must depend on a variety of circumstances with which it may be connected. Let us consult experience, the guide that ought always to be followed, whenever it can be found.

The scheme of representation, as a substitute for a meeting of the citizens in person, being at most but very imperfectly known[2] to ancient polity; it is in more modern times only, that we are to expect instructive examples. And even here, in order to avoid a research too vague and diffusive, it will be proper to confine ourselves to the few examples which are best known, and which bear the greatest analogy to our particular case. The first to which this character ought to be applied, is the

House of Commons in Great Britain. The history of this branch of the English Constitution, anterior to the date of Magna Charta, is too obscure to yield instruction. The very existence of it has been made a question among political antiquaries. The earliest records of subsequent date prove, that Parliaments were to *sit* only, every year; not that they were to be *elected* every year. And even these annual sessions were left so much at the discretion of the monarch, that under various pretexts, very long and dangerous intermissions, were often contrived by royal ambition. To remedy this grievance, it was provided by a statute in the reign of Charles the second, that the intermissions should not be protracted beyond a period of three years. On the accession of Wil. III. when a revolution took place in the government, the subject was still more seriously resumed, and it was declared to be among the fundamental rights of the people, that Parliaments ought to be held *frequently*. By another statute which passed a few years later in the same reign, the term "frequently" which had alluded to the triennial period settled in the time of Charles II. is reduced to a precise meaning, it being expressly enacted that a new parliament shall be called within three years after the determination of the former. The last change from three to seven years is well known to have been introduced pretty early in the present century, under an alarm for the Hanoverian succession. From these facts it appears, that the greatest frequency of elections which has been deemed necessary in that kingdom, for binding the representatives to their constituents, does not exceed a triennial return of them. And if we may argue from the degree of liberty retained even under septennial elections, and all the other vicious ingredients in the parliamentary constitution, we cannot doubt that a reduction of the period from seven to three years, with the[3] other necessary reforms, would so far extend the influence of the people over their representatives, as to satisfy us, that biennial elections under the fœderal system, cannot possibly be dangerous to the requisite dependence of the house of representatives on their constituents.

Elections in Ireland till of late were regulated entirely by the discretion of the crown, and were seldom repeated except on the accession of a new Prince, or some other contingent event. The parliament which commenced with George II. was continued throughout his whole reign, a period of about thirty-five years. The only dependence of the representatives on the people consisted, in the right of the latter to supply occasional vacancies, by the election of new members, and in the chance of some event which might produce a general new election. The ability also of the Irish parliament, to maintain the rights of their constituents, so far as the disposition might exist, was extremely shackled by the controul of the crown over the subjects of their deliberation. Of late these shackles, if I mistake not, have been broken; and octennial parliaments have besides been established. What effect may be produced by this partial reform, must be left to further experience. The example of Ireland, from this view of it, can throw but little light on the subject. As far as we can draw any conclusion from it, it must be, that if the people of that country have been able, under all these disadvantages, to retain any liberty whatever, the advantage of biennial elections would secure to them every degree of liberty which might depend on a due connection between their representatives and themselves.

Let us bring our enquiries nearer home. The example of these States when British colonies claims particular attention; at the same time that it is so well known, as to require little to be said on it. The principle of representation, in one branch of the Legislature at least, was established in all of them. But the periods of election were different. They varied from one to seven years. Have we any reason to infer from the spirit and conduct of the representatives of the people, prior to the revolution, that biennial elections would have been dangerous to the public liberties? The spirit which every where displayed itself at the commencement of the struggle; and which vanquished the obstacles to independence, is the best of proofs[4] that a sufficient portion of liberty had been every where enjoyed to inspire both a sense of its worth, and a zeal for its proper enlargement. This remark holds good as well with regard to the then colonies, whose elections were least frequent, as to those whose elections were most frequent. Virginia was the colony which stood first in resisting the parliamentary usurpations of Great-Britain: it was the first also in espousing by public act, the resolution of independence. In Virginia nevertheless, if I have not been misinformed, elections under the former government were septennial. This particular example is brought into view, not as a proof of any peculiar merit, for the priority in those instances, was probably accidental; and still less of any advantage in *septennial* elections, for when compared with a greater frequency they are inadmissible: but merely as a proof, and I conceive it to be a very substantial proof, that the liberties of the people can be in no danger from *biennial* elections.

The conclusion resulting from these examples will be not a little strengthened by recollecting three circumstances. The first is that the Fœderal Legislature will possess a part only of that supreme legislative authority which is vested completely in the British parliament, and which with a few exceptions was exercised by the colonial Assemblies and the Irish Legislature. It is a received and well founded maxim, that, where no other circumstances affect the case, the greater the power is, the shorter ought to be its duration; and, conversely, the smaller the power, the more safely may its duration be protracted. In the second place, it has, on another occasion, been shewn[5] that the Fœderal Legislature will not only be restrained by its dependence on the people as other legislative bodies are; but that it will be moreover watched and controuled by the several collateral Legislatures, which other legislative bodies are not. And in the third place, no comparison can be made between the means that will be possessed by the more permanent branches of the Fœderal Government for seducing, if they should be disposed to seduce, the House of Representatives from their duty to the people; and the means of influence over the popular branch, possessed by the other branches of the governments above cited. With less power therefore to abuse, the Fœderal Representatives, can be less tempted on one side, and will be doubly watched on the other.

PUBLIUS.

New-York Packet, February 8, 1788. This essay was printed in *The* [New York] *Independent Journal: or, the General Advertiser* on February 9. In the McLean edition this essay is numbered 52, in the newspapers it is numbered 51.

1. For the background to this document, see "The Federalist. Introductory Note," October 27, 1787–May 28, 1788.

Essay 52 was claimed by Madison and H in their several lists. No student of *The Federalist* has been able to prove by internal evidence that either of the two men wrote this essay; E. G. Bourne, for example ("The Authorship of the Federalist," *The American Historical Review*, II [April, 1897], 451), presents only one similarity between essay 52 and Madison's other writings, and J. C. Hamilton (*The Federalist*, I, cxv) gives no convincing parallels between it and other writings by H.

For the reasons why Madison's claim to authorship of this essay outweighs (but does not obviate) that of H, see "The Federalist. Introductory Note," October 27, 1787–May 28, 1788.

2. "being but imperfectly known" substituted for "being at most but very imperfectly known" in Hopkins.

3. "some" substituted for "the" in Hopkins.

4. "proof" substituted for "proofs" in Hopkins.

5. See essay 46.

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Legal Sidebar

The FTC's Competition Rulemaking Authority

Updated January 11, 2023

On January 5, 2023, the Federal Trade Commission (FTC) proposed a rule that would prohibit noncompete clauses in employment contracts. The proposal relies on the FTC's putative authority to issue rules defining "unfair methods of competition" (UMC) under Sections 5 and 6(g) of the Federal Trade Commission Act (FTC Act). Other antitrust rules may be forthcoming.

Such efforts implicate three unsettled questions. First, does the FTC Act provide the FTC with substantive UMC rulemaking authority? Second, if the statute does so, what is the scope of that authority? Third, is rulemaking an appropriate vehicle for implementing antitrust policy?

This Legal Sidebar provides an overview of these questions. A separate Sidebar discusses the FTC's proposed noncompete rule.

Does the FTC Have Substantive UMC Rulemaking Authority?

Antitrust enforcement has traditionally proceeded via adjudication rather than rulemaking. In recent years, however, some commentators have argued for the expansion of the enforcement toolkit, contending that the FTC should activate its dormant competition rulemaking authority.

The existence of this authority is unsettled. While there is case law holding that the FTC possesses UMC rulemaking authority, analysts have debated whether courts would reach the same conclusion if presented with that issue today.

For the foundation of its UMC rulemaking power, the FTC has pointed to the broad language of Section 6(g) of the FTC Act, which empowers the agency to issue rules "for the purpose of carrying out" the statute. Because Section 5 of the FTC Act prohibits "unfair methods of competition," the Commission contends, Section 6(g) provides it with the authority to prescribe rules identifying practices that fall within that category.

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This position has support in the case law. In its 1973 decision in *National Petroleum Refiners Association v. FTC*, the D.C. Circuit held that Section 6(g) authorizes the FTC to promulgate substantive Section 5 rules defining "unfair or deceptive acts or practices" (UDAP) and UMC.

Two years later, Congress responded to *National Petroleum Refiners* in the Magnuson-Moss Act, which established special procedures for the FTC's UDAP rulemakings under a new Section 18 of the FTC Act. Magnuson-Moss did not, however, purport to alter the FTC's UMC rulemaking authority. The statute contains a provision disclaiming an intent to "affect any authority of the Commission to prescribe rules (including interpretive rules), and general statements of policy, with respect to unfair methods of competition in or affecting commerce."

While Magnuson-Moss did not by its terms affect the FTC's UMC rulemaking authority, the Commission has not made extensive use of that power. The FTC has promulgated one substantive antitrust rule—a 1968 regulation (preceding Magnuson-Moss) that involved price discrimination in the men's clothing industry, which the agency never enforced and later repealed.

Some commentators have argued that the absence of a robust historical pedigree for UMC rules—along with several principles of statutory construction—suggest that the FTC does not have substantive UMC rulemaking authority.

First, some observers contend that the D.C. Circuit's decision in *National Petroleum Refiners* employed an interpretive approach that would likely have little traction today. There, a trade association challenging the FTC's rulemaking authority invoked a canon of construction under which the expression of one thing implies the exclusion of others. In particular, the group argued that Section 5's identification of adjudication as the means of implementing the provision's prohibitions should be read as precluding the availability of other enforcement tools like rulemaking. The D.C. Circuit was not persuaded, remarking that the relevant maxim was "increasingly considered unreliable." Some commentators, however, have suggested that courts may give the canon more weight today. Others have argued that modern courts would likewise place greater emphasis on the fact that the FTC had disclaimed substantive rulemaking authority for much of its history—a detail that the D.C. Circuit did not regard as significant.

Second, skeptics of the FTC's UMC rulemaking authority have emphasized another principle under which courts presume that Congress does not alter the "fundamental details" of a regulatory scheme in "vague terms or ancillary provisions"—the so-called "elephants in mouseholes" canon. They argue that Section 6(g)—which is located in a section of the FTC Act involving the FTC's investigative powers—is such a provision. As a result, these commentators contend, Section 6(g) is best read as granting the FTC limited ministerial rulemaking powers, rather than broad substantive authority to prohibit specific categories of conduct.

Such an interpretation may derive further support from the fact that the FTC Act does not provide any penalties for violations of rules adopted under Section 6(g). This type of structural argument and the "elephants in mouseholes" canon played a role in the Supreme Court's recent decision in *AMG Capital Management, LLC v. FTC*, where the Court unanimously rejected the FTC's long-standing interpretation of some of its remedial authority.

Third, some commentators have highlighted the major questions doctrine as another possible impediment to substantive competition rules. Under that doctrine, the Supreme Court has rejected claims of regulatory authority involving issues of "vast economic and political significance" when an agency has been unable to establish "clear congressional authorization" for the relevant power. The FTC's critics argue that the authority to issue substantive UMC rules would implicate "major questions" and that Section 6(g) does not constitute the type of clear congressional authorization that would be necessary to implement such rules.

In addition to these statutory arguments, some observers have suggested that Section 6(g) may raise constitutional concerns if interpreted to authorize substantive UMC rulemaking. The alleged infirmity involves the non-delegation doctrine, which requires Congress to provide agencies with an "intelligible principle" to guide delegations of lawmaking authority. While the Supreme Court has taken a deferential approach in applying this test, several Justices have recently expressed interest in reinvigorating the doctrine. It remains to be seen whether any future litigation over UMC rules would offer an attractive vehicle for that effort.

Proponents of UMC rulemaking have offered several responses.

First, some commentators have reiterated a point that the D.C. Circuit emphasized in *National Petroleum Refiners*: Section 6(g) of the FTC Act does not identify any limitations on the rulemaking power it confers. They argue that the court's reliance on the plain meaning of the statutory text is consistent with current interpretive practice.

Second, supporters of UMC rulemaking have denied that some of the canons of statutory construction discussed above cut against the FTC's authority. For example, some have questioned whether rulemaking would in fact alter the "fundamental details" of a statutory scheme in which the FTC can independently implement Section 5's prohibition of UMC via adjudication. In other words, it may not be clear that UMC rulemaking authority is sufficiently elephantine to justify application of the "elephants in mouseholes" canon.

Third, some commentators have argued that competition rulemaking would not categorically implicate the types of issues that trigger the major questions doctrine. While some UMC rules might involve issues of "vast economic and political significance," they contend, others might not. As a result, the major questions doctrine may play a role in challenges to the scope of the FTC's UMC rulemaking power, rather than the threshold question of whether the agency has such authority in the abstract.

Fourth, defenders of the FTC's UMC rulemaking power have argued that it is unlikely that such authority violates the non-delegation doctrine's "intelligible principle" test based on the Supreme Court's deferential application of that standard. Likewise, they suggest that it is doubtful that UMC rules would categorically violate any replacement test that the Court may adopt, even if the Court might use such a test to invalidate particular UMC rules.

What Is the Scope of the FTC's UMC Rulemaking Authority?

Even if the FTC possesses substantive UMC rulemaking authority, there will likely be questions about the scope of that power. Courts have recognized that Section 5 of the FTC Act is broader than the Sherman and Clayton Acts—the other core antitrust statutes. However, the precise scope of Section 5's extra coverage—often called the FTC's "standalone" Section 5 authority—is unsettled.

Courts and the FTC have concluded that, in addition to prohibiting conduct that violates the Sherman or Clayton Act, Section 5 bars certain "incipient" antitrust violations that may not have ripened into a violation of those statutes. Practices in this category have included invitations to collude; certain distribution arrangements that may mature into an antitrust violation because of specific industry conditions; and sequences of individually permissible mergers that collectively harm competition. Other distinctive Section 5 prohibitions may include conduct that violates the "spirit" of the antitrust laws but falls within a "gap" in their coverage, such as certain pricing practices that facilitate tacit collusion.

While Section 5 is thus broad, the courts have curtailed some of the FTC's attempts to extend its reach. The Commission lost several standalone Section 5 cases in the 1980s, demonstrating that the judiciary has cabined the provision even while acknowledging its capaciousness.

These limits may soon be tested again. In November 2022, the FTC released a policy statement repudiating its previous practice of hewing closely to Sherman and Clayton Act principles in exercising its Section 5 authority. In place of an exclusive focus on consumer welfare, the November 2022 policy statement identifies two criteria that the FTC plans to use to determine whether conduct qualifies as a UMC.

First, the statement indicates that a UMC "may be coercive, exploitative, collusive, abusive, deceptive, predatory, or involve the use of economic power of a similar nature," and "may also be otherwise restrictive or exclusionary."

Second, the statement explains that a UMC "must tend to negatively affect competitive conditions"—for example, by tending to "foreclose or impair the opportunities of market participants, reduce competition between rivals, limit choice, or otherwise harm consumers."

While the policy statement addresses possible justifications for challenged conduct, it does not contain detailed affirmative guidance on that topic. Rather, the FTC notes that there is "limited" case law on "what, if any, justifications may be cognizable in a standalone Section 5 [UMC] case," and that "some courts have declined to consider justifications altogether." The statement further explains that, if a party asserts a justification as an affirmative defense to a Section 5 claim, the FTC "can draw on [its] long experience evaluating asserted justifications when enforcing Section 5, as well as its review of decided cases and past enforcement actions."

Whether the courts will accept the FTC's conception of its standalone Section 5 authority remains to be seen. As discussed, the judiciary has limited several of the FTC's past efforts to extend that power, leading some commentators to characterize the agency's Section 5 litigation record as "uninspiring." In addition, the major questions doctrine may serve as an independent limitation on the FTC's standalone Section 5 authority in specific cases.

Should the FTC Issue UMC Rules?

Besides these legal questions, commentators have debated whether rulemaking is an appropriate vehicle for implementing antitrust policy. Advocates of competition rules have offered several arguments in their favor.

First, supporters of competition rules have argued that *ex post* adjudication moves too slowly to effectively address certain issues—for example, the allegedly anticompetitive conduct of large technology platforms that operate in constantly changing markets. While complex antitrust litigation can take years to resolve, the FTC may be able to develop and enforce competition rules more expeditiously.

Second, depending on their content, rules may provide regulated entities with more legal certainty than some of the open-ended standards that make up antitrust doctrine.

Third, rulemaking may allow for greater democratic participation in the fashioning of competition policy than case-by-case adjudication.

Fourth, rules may have technocratic virtues. Many commentators have argued that generalist judges and lay juries are ill-equipped to analyze the complex economic evidence that plays a central role in contemporary antitrust litigation. In contrast, expert regulators often develop detailed knowledge of specific industries and conduct, which they can deploy during the rulemaking process.

Critics of antitrust rules make several arguments in response.

First, while rules offer the potential benefits of speed and certainty, those virtues may come with the cost of increased error. If UMC rules include bright-line prohibitions, for example, they may condemn unacceptable amounts of procompetitive conduct. By contrast, if rules simply create presumptions of illegality that can be rebutted with proof of procompetitive benefits, they lose some of the speed and certainty advantages that arguably make them an attractive alternative to adjudication.

Second, some commentators have argued that UMC rules present risks of institutional conflict between the FTC and the Department of Justice—the other federal antitrust enforcer. In particular, they contend that UMC rules that reach beyond the Sherman and Clayton Acts would create separate standards of liability that vary between the agencies, raising the possibility of disparate treatment for similarly situated parties.

Third, some observers have contended that UMC rulemaking would likely result in "zig-zagging" regulations that come and go with changes in presidential administration. This phenomenon may undermine the certainty benefits discussed above. Skeptics of UMC rules argue that the FTC's limited resources may be better devoted to litigation under existing procedures, which may produce greater stability than regulation.

Considerations for Congress

Whether the FTC possesses UMC rulemaking authority is primarily a question of statutory interpretation. Congress could thus try to resolve that question via legislation clarifying the Commission's powers. To the extent that Section 5's broad language raises possible non-delegation issues, Congress could attempt to address such concerns by providing more specific standards to guide the FTC's exercise of lawmaking authority.

Congress could also respond to specific competition rules, should the FTC implement them. History may be instructive on this point. After the Commission successfully deployed Section 5 to challenge certain pricing arrangements in the 1930s and 1940s, Congress considered several bills to overturn the relevant decisions, ultimately adopting one of the proposals in 1950. While President Truman vetoed the bill, congressional concerns about the FTC's policies—which various Members expressed through the oversight process—prompted the agency to disavow an expansive reading of the relevant doctrine.

Congressional oversight can also be used to encourage more aggressive enforcement efforts. At various points in its history, the FTC has responded to congressional calls for more vigorous antitrust policy by focusing its resources on specific industries of concern. Members of Congress could thus encourage the FTC to use its putative UMC rulemaking authority to address particular areas of interest.

Author Information

Jay B. Sykes
Legislative Attorney

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The Durability of the Biden Administration's Competition Policy Reforms

William E. Kovacic | Volume 29 , Issue 4

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I cannot think without emotion about the pleasure of participating in the symposium that in the last quarter-century has established itself as an unsurpassed forum for the discussion of competition policy issues. There are other good programs around the world, but nobody is better. I am also moved when I reflect on how the Law Review, with the symposium, has enhanced the stature of George Mason as a powerful intellectual hub in the larger framework of competition law.

I am going to draw upon much of what I learned as a member of the George Mason faculty; in my collaboration with Josh Wright in writing an antitrust casebook; and in my work with Tim Muris, who was my colleague at George Mason for so many years before he invited me to join the FTC as its general counsel. I am going to address a number of themes that have been indispensable to the development of antitrust law and apply them in the context of current efforts within the Biden administration to expand the reach of competition law and policy.

I will consider how the Biden administration might seek to change the framework for competition law enforcement, in addition to changing the basic content of doctrine and policy. You are familiar with the great upheaval that has taken place in U.S. competition policy, captured on the now famous Kahn, Kanter, and Wu coffee cup.[1] (void(0)) You also are aware of how President Biden last summer gave his own imprimatur to a sweeping realignment by signing his executive order on competition policy, which announced a whole-of-government approach to bolstering competition.[2 (void(0))]

In my time at George Mason, I studied not just the challenges of designing doctrine, but also the crucial question of policy implementation. I often recall the many conversations I had with Tim Muris, who not only had played a major role in shaping the way we think about competition law and policy, but also had entered government to make theory meet practice.

In his classic text in political science, Graham Allison[3 (void(0))] considered how we tend to overlook the problem of implementation. Allison observed that if we are going to do a better job in public policy, we have to think harder about how to cross "the path between [a] preferred solution and [the] actual performance of [] government."[4 (void(0))]

In another formative public administration text from a slightly later period, Richard Neustadt and Ernest May observed that in formulating prudent approaches to governance of agencies, public officials must make "canny judgments about feasibility . . . of the contemplated courses of action." Neustadt and May posed three questions that came up repeatedly in my conversations with Tim: "Will it work?" "Will it stick?" "Will it help more than it hurts?"[5 (void(0))]

Before I became an academic, I spent three years with a law firm and worked mainly on projects for the company then known as McDonnell Douglas. I often spoke with engineers who had worked on the U.S. space program. The engineers explained to me that the physics of going to the moon and bringing people back safely was relatively clear; the process involved some very fancy mathematical computations, but the basic concept of how to get to the moon and back was relatively clear.

What was more difficult—exceedingly hard—was the engineering to make it so; how to send humans back and forth safely. When President John F. Kennedy announced in 1961 that the nation should seek to accomplish this task by the end of the decade, the technology needed to do it, for the most part, did not exist. The engineering challenges were formidable indeed.

My focus today is building the institutional conditions needed to carry out basic competition policy reform—to consider the establishment of an enabling environment for sweeping change. In talking about reform possibilities and the obstacles to doing it, I am giving you my views only. From 2014 to 2022, I served as a member of the board of the United Kingdom's Competition and Markets Authority ("CMA"). I d speak for the CMA, but I draw upon my own experiences there in discussing po implementation.

I also have a personal stake in this debate from my own experience. There is a large modern literature that harshly criticizes U.S. competition policy from the early 1980s up to the Biden administration. The milder versions of that critique simply say that policymakers in that era made a lot of mistakes. The harsher assessments refer to the leadership of the Department of Justice Antitrust Division and the Federal Trade Commission as being idiotic and corrupt. That is not the way I like to think about my own time in government, either regarding my motives or my effectiveness. Here, I put that aside, as best I can, to understand better the nature of what the reform advocates are seeking to do, what they face in trying to carry out their program, and what they might do during their time in office that would make the system better by improving its institutional framework.

In so many ways, the themes I am treating appear in the pages of the Law Review's annual symposium going back to its earliest days. The proceedings have featured an interesting mix, not only of commentators talking about what competition policy should do—the substance—but also how to do it, how to go about situating specific reforms in the difficult policy environment that confronts anyone seeking to make things take root, to last, and to work well.

There is a gathering storm that may impede basic change. A large part of the storm is heading the way of the FTC. One ominous development is the Supreme Court's decision in *AMG Capital*, [6 (void(0))] which rejected the FTC's argument that section 13(b) of the FTC Act [7 (void(0))] authorized the agency to seek equitable monetary relief. [8 (void(0))] This was a nine-zero decision. By my count, the last time the FTC experienced a shut out before the Supreme Court was in 1931. [9 (void(0))]

Another relevant matter is the *Axon* [*10 (void(0))*] Axon Enter., Inc. v. Fed. Trade Comm'n, 986 F.3d 1173 (9th Cir. 2021), *cert. granted in part*, 142 S. Ct. 895 (2022). case, which the Supreme Court has chosen to review. *Axon*, in some sense, involves a narrow procedural issue, but it also can be said to go to the heart of the operation of the administrative adjudication mechanism at the FTC. I do not imagine that the Court took the case to reject the claimants' position about when a respondent in an FTC administrative case can go to the federal courts to challenge the constitutionality of the agency's process. I also suspect that the Supreme Court's decision will no a lot of good things to say about the FTC and its operations.

Current plans to expand the use of competition rulemaking rely on section 6(g) of the FTC Act [11 (void(0))] and depend heavily on a 1973 decision of the U.S. Court of Appeals for the District of Columbia: *National Petroleum Refiners*. [12 (void(0))] It is possible that the "best if used by" date of the D.C. Circuit's decision has expired, or that its expiry date has passed, as well. If the FTC commences competition rulemaking proceedings on the basis of *National Petroleum Refiners*, will the reasoning of the court of appeals from fifty years ago hold up today amid greater judicial skepticism about the regulatory state?

The FTC also may seek to perform more fully the role that Professor Daniel Crane has called norms creation [13 (void(0))] by using section 5 of the FTC Act. [14 (void(0))] This function and its embodiment in section 5, to a large degree, motivated Congress to create the FTC in 1914, yet the FTC has enjoyed a minimum of success in fulfilling this vision in the subsequent 107 years. Why will new initiatives fare better this time before a judiciary that is likely to be wary about Commission cases premised upon section 5's famously broad grant of authority?

Until his retirement in 2022, Justice Stephen Breyer had been the Supreme Court's preeminent expert in administrative law, antitrust, and economic regulation. He also has been the best friend the FTC has on the Court, now leaving. His successor (and a former Breyer clerk), Justice Ketanji Brown Jackson, may prove to be more sympathetic than some of her new colleagues are to government intervention in the economy. Yet, no member of the Court today matches Justice Breyer in his regulatory policy and administrative law expertise and his deep knowledge of and, I think, respect for the FTC. As much as he regards the FTC favorably, Justice Breyer authored the opinion for the unanimous Court in *AMG Capital*. His favorable perspective, on the whole, for the FTC will be missing as other matters come about.

Congress seems to be moving toward enacting comprehensive privacy reform. Congress appears minded to give the new privacy enforcement to the FTC. Will this step eventually provide a stimulus to spin off the FTC's competition portfolio to the Department of Justice and transform the FTC into an omnibus consumer protection and privacy authority? To preserve its antitrust mandate, the agency may be pressed to explain why having competition, consumer protection, and privacy under the same roof makes sense.

Another major issue for the FTC that could provoke a basic reassessment of the institutional framework for U.S. policymaking is the agency's portfolio of remedies. Congress in 1914 gave the agency broad power to adjust doctrine and policy, but only light-touch remedies. The chief vehicle for doctrinal adjustments would be section 5 of the FTC Act, and its application would be informed by the unique research capabilities grounded in section 6 of the FTC Act.[15 (void(0))] Another key question for the agency is whether jurisdictional carve-outs for common carriers, not-for-profits, and for banks, created in the early 20th century, will carry on. The persistence of these anachronistic exclusions prevents the agency from carrying out its mandate in vital economic sectors that do not resemble the state of the world as Congress saw it in 1914.

Is the FTC's governance structure fit for purpose? For almost nine years I participated in the monthly meetings of the CMA's board. The rich and productive discussions that took place in these proceedings contrasted sharply with the typically sterile and generally uninformative discussions that take place at the FTC board meetings. The CMA is breathtakingly far ahead of the FTC in using its board as an effective governance mechanism. Can the FTC's governance framework be made more effective? Comparative study that examines the experience of the CMA and other competition agencies abroad would show the path to valuable improvements.

The future of administrative adjudication at the FTC is another appropriate subject of attention, especially if we focus on Dan Crane's measure of FTC performance: the execution of its norms creation function.[16 (void(0))] Since it began operations in March 1915, the FTC has had 107 years to fulfill its intended norms creation destiny. One way to consider the quality of the Commission's experience is to ask what are the FTC's top ten contributions to competition law that go beyond the interpretation of either the Clayton Act[17 (void(0))] or the Sherman Act?[18 (void(0))] What are the agency's greatest hits? Can one identify ten instances in which section 5 of the FTC Act has made a distinctive contribution—good or bad? One might even include settlements in the mix instead of looking only at the adjudication of cases that result in favorable assessments by the courts of appeals. To identify even ten section 5 examples is difficult. Perhaps the Commission's second century will be better, yet one is forced to ask why the agency has achieved so few positive results since 1914.

And last, as mentioned earlier, what is the appropriate combination of functions within the Commission? The FTC was conceived initially to be just a competition agency. In the Commission's first decades, consumer protection made its way into the agency's work as a way of ensuring that dishonest advertisements did not divert trade away from honest merchants and impose upon them a competitive disadvantage. Since the late 1960s, beginning with the adoption of measures such as the Fair Credit Reporting Act,[19 (void(0))] the FTC has acquired a privacy portfolio. Is it sensible to bundle these functions together in one agency? I think there is a good conceptual rationale for doing it (especially to treat phenomena in the digital economy), but the FTC is going to have to demonstrate that the integration of these policy domains provides a better outcome than one would achieve if they were separately organized. Otherwise, the FTC simply becomes a conglomerate manager of distinct operations and must argue that it has a superior ability to manage those assets and use them well, even though it does not realize synergies among them in practice.

As noted earlier, where will Congress put the privacy portfolio? Will it go to the FTC? If it does—probably with 200–300 additional work years—the pie chart of the FTC budget will contain a relatively small slice called "antitrust." In looking at the small antitrust slice, one might consider moving the Commission's antitrust portfolio to the Department of Justice and making the FTC only a consumer and privacy agency. In thinking about its future mandate, the FTC will be confronted with the question of why it is wise to continue the existing allocation of authority.

Developments abroad may provide a stimulus to rethink the U.S. competition policy institutional framework. In the last 15 years, a variety of jurisdictions that once had two or more national competition authorities have decided to consolidate antitrust responsibilities in a single agency. These include China, France, Spain, United Kingdom; all unified their enforcement framework at the national level into a single agency.[20 (void(0))] Today, the United States stands alone in having two antitrust authorities at the national level.

Many foreign agencies have achieved superior intellectual leadership in competition policy. Among other means, they have shaped the debate by conducting research and publishing reports and studies. I would not have said, ten or fifteen years ago, that such a change had taken place. I am convinced that it has now. Others have explored the development of better policy tools. I am a big fan of what the United Kingdom has done with its markets regime. The United States has one, but it doesn't have the remedial features that the United Kingdom does.

As I mentioned before, other agencies abroad are getting much more mileage in using their governing boards to do what a board ought to do: develop a broad strategic vision, discuss the significance of changes in the economic and political environment, identify priorities, allocate resources, and consider the appropriate future direction for policymaking. The CMA is unmatched globally in developing internal governance structures for doing these things well. The CMA's experience contrasts unfavorably with what is taking place at either the FTC or at the Department of Justice. Our agencies that used to lead the field are no longer doing so. And how do you regain that position of influence? I think improving governance—certainly at the FTC—is a crucial step in that direction.

What are the reform possibilities? What could current management do in this period of possible change to provide a stronger basis for policymaking? The federal antitrust agencies are developing bold policy proposals. What could they do to put the institutional framework on a better footing than it is now, to ensure that not only their own programs, but the programs of their successors proceed better? Here are a few possibilities.

Deeper cooperation among the relevant policymakers is a place to start. That is suggested by the whole-of-government approach announced in President Biden's executive order on competition policy. The executive order is a healthy step toward unifying disparate areas of policymaking and building connections that can increase competition. Government agencies could achieve a lot by removing unnecessary barriers to participation in the market, to facilitate entry and growth by smaller and newer firms, and to get unnecessary restrictions out of the way. Other useful measures include better disclosure of what the antitrust agencies are doing and an enhanced evaluation regime.

The leadership of the federal antitrust agencies has shown a keen interest in increasing litigation as a policymaking tool. Jonathan Kanter, the Assistant Attorney General ("AAG") for Antitrust, has said: "[w]e need new published opinions from [the] courts . . . . we need to be willing to take risks and ask the courts to reconsider the

application of old precedents to [new] markets."[21 (void(0))] In the 1990s, during his tenure as AAG, Joel Klein also emphasized the importance of using litigation t[illegible]y out what he called "a conversation with courts."[22 (void(0))]
Litigation is a crucial policymaking tool, but there is nothing easy about it. Tim Wu now serves as President Biden's chief advisor on competition policy. In his earlier life as an academic, Professor Wu commented about the initiation of the FTC's monopolization case against Facebook: "This is [a] straightforward and [] easy case."[23 (void(0))] An interesting custom I've observed in the United Kingdom is that when you have confronted what you think is a doubtful proposition, one common reply is to say, "really?"

Really? Are there any "straightforward and easy" cases dealing with section 2 of the Sherman Act? To overcome the formidable obstacles to success in these cases, will the Department of Justice and the FTC take a truly integrated approach to devise and carry out a litigation strategy that is going to change a doctrinal framework that at the moment does not welcome expansions in the reach of public intervention?

A joint venture—a genuine joint venture—between the two agencies has never been realized. Useful cooperation takes place as needed in specific endeavors, such as drafting merger guidelines. It could be better. For the most part, the two agencies do not regularly sit down together to map out the boundaries of doctrine, to discuss where to make desired extensions, to identify the obstacles to accomplishing extensions, and devise a common strategy to realize their doctrinal aims.

This is a moment when such deeper cooperation could happen. This is suggested in comments that Jonathan Kanter made on the day that he and FTC Chair Lina Khan rolled out the announcement of the public consultation on merger guidelines.[24 (void(0))] Kanter's comments speak generously and positively about the FTC's leadership and the agency's contribution to policymaking. AAG Kanter is an alumnus of the FTC (he once worked in the engine room as a case handler), and I think he believes that.

The Kanter comments may reflect an understanding that unless the FTC and the DOJ work more closely together and see their common cause in building a larger strategy, they will not attain their ends. Means for greater integration include building a common research agenda as the basis for bringing cases, developing a program of regular inter-agency secondments, and having common teams to develop cases in shared areas of interests such as Big Tech and mergers.

The two agencies must ask, in a very non-sentimental way, how many major cases they can run successfully at one time. Answering this question would benefit from historical awareness that studies past experience to determine what worked before and why it worked, to study what failed and consider why.

A key example to study is the FTC from the 1970s, when the agency responded to demands for a bold transformation. An ABA Blue Ribbon report in 1969[25 (void(0))] said the FTC ought to leave behind all of the clear-cut cases and focus its competition resources on cases involving big commercial stakes and unsettled areas of the law. In other words, do big cases involving novel applications of the FTC's powers. In this terrain, the Commission would confront major commercial interests and face the greatest danger of being rebuked in the appellate process. By 1977, the FTC had done lots of that on the competition and consumer side of the house.[26 (void(0))] The competition agenda features ambitious cases involving shared dominance, predatory pricing, distribution practices, and ethical codes imposed by professional societies. By 1977, the FTC was running fifteen consumer protection rules under the Magnuson-Moss[27 (void(0))] framework.

A sobering part of that experience is to realize that the management tools and staffing needed to do this well were not really created until the late 1970s: too late to set the matters on the right path. Today, as the federal agencies consider adding new ambitious matters to the litigation or rulemaking agenda, do they have a good match between their commitments and capabilities? The DOJ and the FTC have promised to do a lot. If they do not account for earlier experience carefully to make sure there is a good fit between commitments and capabilities, the agencies will have a painful number of failures that will dishearten their professional staff and will undermine their larger reform program.

Many other elements of past antitrust experience deserve a close look. The FTC and DOJ collaborated effectively in devising an FTC research program that fed into DOJ cases in the 1940s and early 1950s. The case management that DOJ brought to the Microsoft case in the 1990s provides valuable insights into how to run major litigation matters.[28 (void(0))] The FTC's monopolization case against Facebook is set to go to trial no sooner than February 2024, and the DOJ monopolization case against Google will go to trial in September 2023. With the likely appeals, these matters will not be completed until the second half of this decade. The DOJ brought its monopolization complaint against Microsoft in May 1998.[29 (void(0))] The trial began in October of 1998. What is going on in the recent cases that makes the prolonged timetable necessary? Is there nothing to learn from what the DOJ di[illegible] the Microsoft case?

Another lesson is to put smaller cases (e.g., *Lorain Journal,*[30 (void(0))] *Otter Tail,*[31 (void(0))] (https://lawrev *Polygram*[32 (void(0))] Polygram Holding, Inc. v. Fed. Trade Comm'n, 416 F.3d 29 (D.C. Cir. 2005).) in the litigation portfolio. Viewing smaller cases in isolation, one might shrug and say, "who cares?" The smaller cases helped make big law; they were the vehicles for significant adjustments in doctrine that became building blocks for future cases. The FTC's Part III masterpiece in *Hospital Corp.*[33 (void(0))] *In re* Hosp. Corp. of Am., 106 F.T.C. 361 (1985). in the 1980s is another episode that rewards careful study. Commissioner Terry Calvani's masterful opinion for the FTC gained the consent of Judge Posner and his colleagues on the Seventh Circuit.[34 (void(0))] Nobody who writes a Part III opinion for the Commission should not study that decision carefully as a model for how you gain deference; not as a matter of form, but in reality.

The agencies also might examine how the FTC restored effective hospital merger control in the 2000s. As the FTC Chair, Tim Muris led the agency in studying why it was losing hospital merger cases and how it could recover.[35 (void(0))] The agency carried out research projects to test the assumptions underpinning earlier adverse decisions. The FTC recovered by carrying out its own whole-of-government approach, which included FTC cooperation with the Department of Health and Human Services to build a data set for challenging hospital mergers. By the second half of the 2000s, the strategy worked and the FTC had restored its credibility to challenge anticompetition hospital consolidations.

The examination of past experience indicates how equity concerns have appeared in earlier antitrust cases. In the FTC's *South Carolina State Board of Dentists*[36 (void(0))] *In re* S.C. State Bd. of Dentistry, 138 F.T.C. 229 (2004). case, the opinion written by Commissioner Mozelle Thompson begins by describing the likely beneficiaries of the challenge to unnecessary state restrictions on dental care fluoride treatment. The program at issue promised to benefit children in relatively poor public school districts. The program the FTC sought to encourage promised to have a decidedly positive distribution impact. The dentists case shows that the FTC has brought cases that aid the dispossessed. This experience suggests that the traditional framework of analysis can embrace cases that accomplish distribution aims.

Last, as the agencies contemplated how to successfully navigate possible trips to the Supreme Court, past experience again provides a useful guide. The last time the FTC or DOJ appeared before the Supreme Court as a party in a Sherman Act section 2 case was *Otter Tail* in 1973.[37] When was the last FTC victory in the Supreme Court in a section 2 case? That would be never. As the FTC's monopolization case against Facebook proceeds, the agency has to consider what steps will position it to enjoy the greatest prospects of success. The Supreme Court section 2 jurisprudence since 1973 has been formed entirely in the context of private cases. The Court's decisions in these cases have expressed concerns about over-deterrence through private rights of action. Is there a way to convince the Court that those concerns are overstated and that the federal government, when it comes into court, stands on a different footing with different names, different motivations?

In many ways, the approach for improvements set out above can be taken by the agencies with existing resources and within the bounds of their existing powers. There are other things that require congressional action. For years, members of Congress have spoken of giving the DOJ and the FTC larger appropriations and to date have done nothing. Will Congress mandate a sweeping makeover of doctrine in the antitrust system? That seems doubtful. Instead, we are more likely to see targeted measures focused on Big Tech only. This means that, in the larger framework of policymaking, the federal antitrust agencies are still going to have to learn what you want to get through the courts, which is why formulating a common strategy is so important.

Even if it makes no changes to legal standards, Congress must confront the resource and capability issue. It is a matter of adding more people and changing the mix of skills. The CMA has built a team of fifty people (the "DaTA unit") to improve its capacity to do analytics and to deal with high technology issues. The team includes computer scientists, engineers, and specialists in data analytics. The DaTA unit has increased the CMA's ability to understand what is going on in the tech marketplace and bring the modern tools of analytics to bear on policymaking. In the future, it is likely that every agency will move toward developing its own variant of the DaTA team. Will Congress provide the resources for the DOJ and the FTC to develop a similar capability?

Congress also must address a serious compensation problem. For quite a while, going back to earlier contributions to the Law Review symposium, I have suggested that unless you improve the wages paid to skilled personnel, you will be forever chasing from behind in a losing race. If Congress can give the Consumer Financial Protection Bureau ("CFPB") a 20–25% boost over the pay scale for the rest of the government, is consumer financial protection so much more important? Is competition law not so important?

If this compensation issue is not addressed, we will always have a severe constraint on the agencies' capacity to run antitrust cases, especially high stakes matters involving major defendants. At current compensation levels, the revolving door will take large numbers of good people away, because the wage differential is so great. Can Congress devise other ways to make up the difference with generous student loan forgiveness policies? The agencies cannot assemble and maintain the teams you need to run hard matters unless Congress is willing to pay for it. Action on greater resources and a new compensation schedule are telling measures of the sincerity of Congress about all its reform commitments. If Congress is going to say such reforms are just too hard, a markedly more ambitious antitrust program will be unattainable.

I offer a few closing comments on why fundamental reforms will be hard to accomplish. One problem is that the realization of major, durable antitrust reforms takes a lot of time. Are you going to be able to sustain a commitment to do this over the number of years that you will need to do it? And can you overcome the side effects of the "catastrophe narrative" that I will mention in a moment? The big competition policy reforms that began during the Reagan era took a long time to embed in the U.S. system. Presidents Reagan and George H.W. Bush had 12 years to appoint judges, to appoint leadership, to change the culture of the agencies. How many elections will it take for the Biden era reforms to take root and flourish? How many election victories will it take to move policy and the institutions in another direction? My sense is that incumbent leaders of agencies, when they realize how little time they have, tend to focus on the substantive program and not the institutional reforms.

Success requires persistence in a long-term policy race. Individual heads of agencies generally have relatively short tenures. By my count, the average AAG tenure since 1933 has been about 2.7 years, and the average FTC Chair's tenure since 1950 has been about 3.3 years. The clock is ticking loudly for the Biden antitrust leadership. The time passes so quickly. Will there be a succession of leaders with shared to carry on the Biden era antitrust transformation? How many elections are you going to win to carry out your program? Those considerations weigh against spending a lot of your time on the kind of institutional changes that I have in mind; even the deeper integration between the FTC and the DOJ.

Then there is the catastrophe narrative. How do you make the case for sweeping change: you make it by saying "everything that's there is rubbish," that everything is falling apart. This is an unfortunate part of our political discourse. It preceded the transformation in 1981. It preceded the transformation in 1969 and 1970. And the catastrophe story preceded the transformation that is taking place now. President Biden set out his own version of the catastrophe narrative in his statement accompanying the executive order: "Forty years ago, we chose the wrong path . . . following the misguided philosophy of people like Robert Bork, and pulled back on enforcing laws to promote competition." [38 (void(0))]

American Economy and an Exchange with Reporters, 2021 DAILY COMP. PRES. DOC. 1 (July 9, 2021). In Biden's telling, Bork is the bad guy responsible for the antitrust enforcement dereliction and the architect of forty years of a failed policy experiment. Really? Was it all so bad, and did nothing good take place that is worthy of emulation?

President Biden did not mention that the administration of Barack Obama—in which Biden served as vice president—is frequently damned by reform advocates more strongly than Reagan. A variety of publications in which those who demand more robust enforcement bitterly attack the Obama era. [39 (void(0))] For example, early in 2021 Matt Stoller of the American Economic Liberties Project, observed: "the worst people in the Obama administration were the antitrust enforcers. Total failures, and completely unashamed." [40 (void(0))]

The modern catastrophe narrative attributes weak enforcement not only to poor judgment or timidity, but also argues that agency leaders (and professional staff) were bad human beings. Jonathan Tepper and Denise Hearn, part of the loud chorus of authors who have attacked the modern enforcement program, punctuate their critical commentary about the FTC and DOJ with personal slurs. [41 (void(0))] Who would ever want to work for these agencies? Who would ever want to be part of such a dismal history? In short, the narrative asserts that bad agencies populated with bad people generated bad programs.

What happens if agency leaders embrace this narrative? If they regard the era that President Biden depicts as forty years of failure as a wasteland, they are unlikely to learn useful lessons from past experience. Why devote effort to study a period of calamitous disaster? A grim side effect of accepting this story is that it complicates one's efforts to motivate agency staff and get them to commit themselves to an aggressive program, to work really hard, to basically do private-sector hours for public-sector wages, if they've just been told that everything they did for the last forty-plus years was useless. And you're creating unattainable expectations about how you'll make it all better. You can make it somewhat better, but you don't have time to make it all better in your own vision.

The catastrophe narrative obscures many durably valuable things that happened in the wasteland, including litigation accomplishments such as *Hospital Corp.*, *H&R Block*,[42 (void(0))] *Polygram*, *Realcomp*,[43 (void(0))] *South Carolina State Board of Dentists*, and three consecutive successful trips to the Supreme Court.[44 (void(0))] The wasteland era also features innovations in how to design rules (e.g., the FTC's Do-Not-Call initiative), and in how to formulate programs with broad economic payoffs and broad social benefit, such as the DOJ's programs to prosecute and deter collusion in public procurement. Are these and related matters merely rubbish and not worth a close look?

The catastrophe narrative also blinds its exponents to forms of collaboration that the federal agencies undertook to improve competition policy. The omitted history includes the approach that James Rill (DOJ) and Janet Steiger (FTC) took in the late 1980s and early 1990s to develop the agencies' technical assistance abroad. They embraced a view that said a nonpartisan orientation was essential in advising other countries. The two agencies listened carefully to their foreign counterparts, provided policy options, and when asked for a normative prescription, provided the best assessment of what would work in the distinctive conditions of the host country.

The catastrophe narrative blinds the exponent to all of this experience. The narrative that inspired the ascent to power gets in the way of exercising power effectively. In carrying out an ambitious program of antitrust litigation or rulemaking, the federal agencies will need all the help they can get. For DOJ and the FTC, the help can come in several forms beyond the initiative and insight of the Biden administration's appointees. It can come from a dedicated effort by the two agencies to further integrate policymaking; from comparative study that identifies superior methods of governance and agency administration; and from reflection on what has worked well for the agencies in all eras of their operation. These are paths to getting good answers to the Neustadt and May queries: Will it stick? Will it work?